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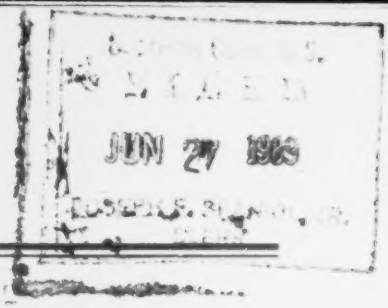

In The

Supreme Court of the United States

October Term, 1989

LOYER EDUCATIONAL TRUST,
LARRY McDONALD, TRUSTEE,

Petitioner,

v.

WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY, Individually, Jointly and Severally, now County of Wayne, its Successor in Interest,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

– AND APPENDICES –

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QUESTIONS PRESENTED

I.

WHETHER A STATE MUST ENTERTAIN A CLAIM UNDER 42 USC § 1983?

II.

WHEN A GOVERNMENT AGENCY CREATES A SYSTEM OF FINANCING PUBLIC ROAD IMPROVEMENTS NOT OTHERWISE CREATED BY STATE STATUTE EMPOWERING THE AGENCY, HAS THE AGENCY USURPED THE LEGISLATIVE TAXING AUTHORITY OF THE STATE IN CONFLICT WITH THE PRONOUNCEMENTS OF THIS COURT'S DECISIONS?

III.

WHEN A LOCAL GOVERNMENT AGENCY, PURSUANT TO AN ADMINISTRATIVE RULE, REGULATES THE ENTRY BY A PRIVATE PROPERTY DRIVEWAY TO AN UNIMPROVED PUBLIC STREET BY REQUIRING THE ENTERING OWNER TO CONSTRUCT OFF-SITE CAPITAL IMPROVEMENTS WITHOUT A STANDARD FOR APPORTIONING THE COST OF THOSE IMPROVEMENTS AMONG THE ABUTTING LANDOWNERS AND THE PUBLIC, HAS THE PRIVATE PROPERTY OWNER BEEN DEPRIVED OF "DUE PROCESS OF LAW" AND "EQUAL PROTECTION OF THE LAW" WITHIN THE MEANING OF THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION?

IV.

WHEN A LOCAL GOVERNMENT AGENCY DENIES ACCESS TO A PUBLIC ROAD TO AN OWNER OF PRIVATE PROPERTY BY DEMANDING AN EXACTION NOT DEFINED BY THE LEGISLATION, HAS THERE BEEN A TAKING OF THE USE OF THE PROPERTY REQUIRING THE APPLICATION OF THE "JUST COMPENSATION" CLAUSE FOR THE REGULATORY TAKING OF THE USE OF THE PROPERTY?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Michigan Supreme Court.

The Township of Brownstown was dismissed at an earlier stage of the proceedings as a Defendant and is not a party to this appeal.

The Michigan Municipal League was granted leave to file an *Amicus* Brief in the Michigan Supreme Court on behalf of all the municipalities in the State of Michigan.

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OPINIONS BELOW

The opinion of the Trial Court was not published and is attached (Appendix H). The Court of Appeals' decision was published at 168 Mich App 587, 425 NW2d 189 (1988); a copy of the opinion is attached (Appendix B).

The Michigan Supreme Court denied LOYER's Application for Leave to Appeal (Appendix E) by Order denying leave to appeal but granting the Michigan Municipal League's request to file a brief *Amicus Curiæ* (Appendix D) on December 29, 1988.

LOYER filed a timely Motion for Reconsideration (Appendix C) in the Michigan Supreme Court, which

was also denied upon its Order dated March 29, 1989 (Appendix B).

LOYER claimed throughout the proceedings:

A. a violation of its Federal Statutory Civil Rights
B. a violation of "Due Process" and "Equal Protection"
C. a "Taking without Just Compensation"
D. lack of statutory authority to deny a driveway permit.

The Michigan Courts denied the claims in a perfunctory fashion with no analysis of the Federal Claims raised.

JURISDICTION

A timely notice of Appeal to this Court was filed June 19, 1989 (Appendix A).

Jurisdiction of this Court is invoked pursuant to 28 USC § 1257, because a local administrative rule was challenged as violating the U.S. Constitution and the rule was upheld by the Michigan Courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Fifth Amendment, United States Constitution:

> ". . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

- Fourteenth Amendment, United States Constitution:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities

> of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

- *Driveways, Banners, Events and Parades – An Act to Regulate Driveways, Banners and Parades Upon and Over Highways*; Mich. Comp. Laws Ann. § 247.234; Mich. Stat. Ann. § 9.140(24) (see Appendix N).

- *Rules, Standards and Procedures for Driveways*, p. 10:

> "The permit applicant shall provide a passing lane on the side of the highway directly opposite a proposed commercial, industrial, apartment driveway or other heavy traffic generators when warranted in accordance with the highway vehicle volume and anticipated peak hour vehicle left turns from the highway as shown in Figure 7. When other conditions such as horizontal and vertical sight distance, traffic signal location and other physical factors directly affect public safety, a passing lane shall be required. Minimum dimensions for a passing lane are shown in Figure 8 of the Road Commission rule adopted by them."

The Complaint alleged the Federal Statutory Civil Rights Act violation, in addition to the "Taking" issue (Appendix L). The Federal issues were raised at the earliest possible time and evidence was introduced at trial to support the claims. These issues were briefed and raised throughout the appellate process.

STATEMENT OF THE CASE

Plaintiff, LOYER EDUCATIONAL TRUST, hereinafter referred to as LOYER, was created by Lavern and Frances

Loyer to provide for the education of their children. The trust purpose having expired with the education of their children, the surplus or corpus of the trust was invested in a two and one-half acre parcel of property in Brownstown Township to develop Sibley Plaza, a strip shopping center ("shopping center").

LOYER applied for permits from Brownstown Township to construct the twenty-three thousand square foot shopping center on land located on the South side of Sibley Road, a two-lane gravel shoulder road, in Wayne County. Sibley Road right-of-way runs East/West through the southern portion of Wayne County; it has a maximum speed limit of 45 miles per hour at the location of the shopping center and is owned and maintained in public trust by the Wayne County Road Commission.

Construction of the commercial development was commenced in accordance with the architect's drawings, which had been submitted to and approved by the Township's Planning Commission and Building Department. Loyer Construction Company was hired to build the shopping center. The construction company is located directly behind the shopping center site and operates a soil field at the location.

The Trust thereafter applied for a permit from the Wayne County Road Commission ("Road Commission") to construct a driveway from the shopping center to Sibley Road, in order to give the public ingress and egress to the various business establishments which were to be located there. The Road Commission refused to grant the permit, citing as its reason that it was first necessary for LOYER to expend its own funds to pave two additional lanes for Sibley Road, one on LOYER's side and one on the opposite side.

Before it would grant the driveway permit and in order to accommodate such passing lanes, the Road

Commission also mandated that LOYER totally absorb the cost of relocating or enclosing a major county drain on the opposite side of the road, specifically, the Van Clief Drain, which runs parallel to Sibley Road on its northern edge. This drain could hold a car without the top being seen.

The Road Commission also demanded that, as part of the lane improvements, a private road by the name of Emit be improved where the intersection joined Sibley Road. This street also was on the opposite side of Sibley from the shopping center development. The improvement to Emit Street consisted of having to remove the culvert or drainage tile under the present intersection of Emit Street and paving the intersection where it enters Sibley Road. Emit Street services a subdivision which lies to the North of Sibley Road. Emit is an unimproved gravel drive which has never been dedicated to the Township or County for maintenance.

In an attempt to exact the costs of these expensive road improvements from LOYER rather than by using county general tax funds or creating a special assessment tax district, as set forth in the law, the Road Commission further demanded, as part of the permit process, that LOYER install all of these improvements. This high-speed passing lane was to abut no property that was owned by LOYER; it would greatly enhance the quality of the Sibley Road surface and increase the value of the property located across the road from the shopping center, thereby giving a windfall to the county and surrounding land owners because the road would be finished for all at LOYER's expense.

LOYER estimated these off-site improvements to cost over ONE HUNDRED THOUSAND ($100,000.00) DOLLARS. LOYER arranged meetings with the Road Commission in order to analyze alternative plans proposed,

including relocating the driveway, and offering to put in the lane on its side of the road. The Road Commission offered to allow LOYER to post a bond for the improvements, but would not guarantee the ceiling on the bond. The Road Commission would have required LOYER to pay any additional charges if their estimate of forty thousand ($40,000.00) Dollars was too low. LOYER declined to post the bond because it was an open-ended offer with no ceiling for the improvements required of them.

Having been thwarted at every attempt by the Road Commission, the shopping center remains unopened.

LOYER brought this action to compel the Wayne County Road Commission to issue its permit and/or restrain its interference with the opening of the driveway to the shopping center. LOYER contended that there was no statutory authority under *Driveways, Banners, Events and Parades,* MCLA § 247.234; MSA § 9.140(21), to allow a county road commission to coerce a private landowner to install off-site improvements in a county road at the landowner's expense.

LOYER also requested money damages for losses incurred for its inability to open for business.

The Wayne County Circuit Court denied the request for Mandamus or in the alternative an Injunction and left Plaintiff to its remedy of money damages. These damages consisted of loss of rents while the shopping center remained closed, and claims for discriminatory treatment. The testimony as to these damages was unrebutted at trial and remain uncontroverted as well as continuing.

The testimony at trial, by the Road Commission's own Engineer, admitted that no standard existed for apportioning the cost of off-site improvements.

LOYER's counsel asked the question of Mr. Richardson, the County Engineer, at p. 291, line 24 of the transcript:

> "Q. Do you have some kind of policy or standard drawn up at the old Wayne County Road Commission that would decide who has to pay what and when?
>
> "A. No.
>
> "Q. And pretty much it is left to the staff members as they see a situation: is that not correct?
>
> "A. In this situation it was a staff determination."

LOYER claimed damages for the taking of its opportunity to open the shopping center, and for discriminatory treatment between itself and a competitor located down the street in that no standard was established to apportion costs for off-site improvements. The competitor paid six thousand ($6,000.00) dollars for its improvements, which were similar in nature to LOYER. The Road Commission reasoned that the competitor had just selected a better location to build. The Trial Court adopted this position without any further analysis.

LOYER also claimed a taking from it by way of the requested improvements which benefitted the landowners on the opposite side of the street and the public at large. LOYER claimed that this action was also discriminatory.

LOYER also claimed all use of the property was taken by the refusal to issue the permit.

The Trial Court held LOYER had no cause of action. The Wayne County Circuit Court issued an opinion which upheld the Road Commission's denial of a drive-

way permit. The Trial Court reasoned that rules promulgated pursuant to the *Driveway Act*, § 9.140(24), Rules and Standards, gave authority to the Road Commission to deny LOYER a permit unless it put in the required improvements on the opposite side of Sibley Road (pp. 2 and 3 of Trial Court's opinion, Appendix H, pp. H-2–H-3).

The Michigan Court of Appeals upheld the Trial Court's decision. Furthermore, the Court of Appeals held that there was no taking from LOYER nor disparate treatment of LOYER and therefore, no damages were owing to LOYER (p. 6 of Court of Appeals' opinion, Appendix F, pp. F-7–F-8).

It is from these findings LOYER appealed to the Michigan Supreme Court.

The Michigan Supreme Court declined to grant leave to appeal, after a timely notice and application were filed (Appendices D and E).

After a Motion for Reconsideration was filed, the Michigan Supreme Court again declined to hear the case (Appendix B).

It is from this denial of the Motion for Reconsideration that a Petition for Certiorari is brought to this Honorable Court.

BACKGROUND

The Michigan Courts have navigated a course which carried them into unconstitutional waters in the present case. Michigan suddenly veered from the true course for two reasons, which caused them to arrive at an improper result. The reasons are quite clear:

A. The Michigan Courts made a herculean effort to avoid a meaningful analysis of Federal Statu-

tory and Constitutional protections when raised in the context of a state action. Prior case law was consistent with the requested finding in *LOYER* except for one glaring difference — LOYER requested money damages for violation of its Federal Statutory Civil Rights, an unconstitutional "Taking without Compensation" and violation of "Due Process" and "Equal Protection." Fifth and Fourteenth Amendments to the United States Constitution.

B. The Michigan Courts allowed the Road Commission to raise money for road improvements without the need for tax legislation.

Unless this Court acts to compel the Michigan Courts to recognize these violations, a citizen in Michigan who asserts these claims will not have a forum in which to be heard.

A. The *Arrowhead* Analysis

The Michigan Courts decided two cases which set out a responsible and constitutional approach to exactions:

In *Arrowhead Development Co.* v *Livingston County Road Comm'n.*, 413 Mich 505, 322 NW2d 702 (1982), the Michigan Supreme Court found that the County Road Law and the *Subdivision Control Act* were devoid of any statutory authority whereby a county road commission could compel a private developer to install off-site road improvements on a county-owned road as a precondition to receiving county approval of a plat and subsequent construction project. In addressing the contention of the Livingston County Road Commission under County Road Law, the high court in Michigan stated:

> ". . . The permissible methods of financing county road improvements are borrowing and

> taxation. Nowhere in the statute is there to be found authorization for exacting the cost of a county road improvement from a subdivision developer, and we think none can be fairly implied. *Id.* at 512-13, NW2d at 706."

In the *LOYER* case, we are merely dealing with a driveway and not a subdivision development. The County has forbidden approval of a permit to open the facility and begin to conduct business based on a driveway permit. The legislature enacted Act 200, 1969, p. 382, *Driveway, Banners, Events and Parades – An Act to Regulate Driveways, Banners and Parades Upon and Over Highways,* Mich. Comp. Laws Ann. § 247.234; Mich. Stat. Ann. § 9.140(24) (Appendix N).

The *Driveway Act* indicates that permits for driveways shall be granted in conformity with rules promulgated by the Highway Authority. Nowhere in the Act does it say that the Authority can compel off-site improvements as part of the permit process. The Road Commission granted themselves that authority through adoption of their own rules.

In addition to the passing lane, in this case, the Road Commission required the enclosure of a major county drain and the pavement of a private road intersection on the opposite side of the street. It is this type of unreasonable requirement which the Michigan Supreme Court addressed itself to in *Arrowhead, supra* at 709:

> "We hold that the Commission exceeded its limited statutory powers in conditioning the plat approval upon Arrowhead's agreement to pay for the off-site county road improvement. Consequently, the judgment of the Court of Appeals is reversed."

It is clear from this holding by the Michigan Supreme Court that the statutory authority of the County Road Commission does not extend to forcing developers to pay for off-site road improvements.

In *Arrowhead*, the defendant, Livingston County Road Commission also contended, under General Highway Law, Mich. Comp. Laws Ann. § 224, that a provision of the *Subdivision Control Act*, MCLA § 560.183; MSA § 26.430(180), was sufficient authority to precondition plat approval on the implementation of off-site road improvements by the private developer. The Supreme Court, however, rejected this alternate theory and found that:

Section 183, in relevant part, provides:

> "(1) The county road commission may require . . .
>
> > "(b) Adequate provision for traffic safety in laying out drives which enter county roads and streets, as provided in the board's current published construction standards. *Id.* at 515, NW2d at 707."

The Court found that this statutory language, after reading the statute as a whole, was insufficient to confer authority upon the county road commission to compel the private developer to install off-site road improvements. The statutory language, in the present case, relied upon by the Road Commission, relates to the same safety provision as that under the *Subdivision Control Act, supra*, in which the Supreme Court found no explicit or implied authority to impose the cost of off-site road improvements on the developer.

The facts of the case at bar and the statutory language of the *Driveway Act* merited a judicial interpretation consistent with that of the Supreme Court in

Arrowhead. In *Arrowhead*, the road improvement was to be located on a part of the road not abutting or adjoining the developer's property. In the present case, the proposed passing lane and attendant drain diversion and intersection improvement are to be located on the opposite side of Sibley Road, not adjoining or abutting plaintiff's property, but adjoining property owned by unrelated third parties. The Court in *Arrowhead* addressed this issue by stating:

> "... it would be impermissible to impose the entire cost of an off-site improvement on a single subdivision developer, where other persons or property would be specifically benefited. The absence of a statutory provision establishing standards and procedures for such apportionment is indicative of a legislative assumption that the responsibilities of a subdivision developer do not extend beyond the borders of the subdivision itself unless explicitly imposed by the Legislature." *Id.* at 519, NW2d at 709.

Under the current demands of the Road Commission, LOYER will be forced to improve a county-owned road at private expense. The proposed improvements will not only enhance the quality of the county road, but will increase the property values of third-party owners who will be directly benefitted by the construction. Additionally, the County requirements would force LOYER to improve an intersection for a private road.

LOYER asked that the Michigan Court find that the defendant, Road Commission, was without statutory authority to precondition the granting of a driveway permit on the installation of off-site road improvements by the plaintiff, LOYER. This they declined to do.

B. Direct Application Of The *Arrowhead* Analysis Was Warranted Under The Further Case Delineation By The Court Of Appeals In Michigan.

In *Charter Township of Harrison* v *Calisi*, 121 Mich App 777, 329 NW2d 488 (1982), the Michigan Court of Appeals accepted the opportunity to apply the rationale of the *Arrowhead* case to the *Township Rural Zoning Act*, MCLA § 125.286 *et seq.*; MSA § 5.2963 *et seq.* The defendant, Calisi, owned a restaurant and nightclub facility in Harrison Township and applied for a permit to improve and expand his establishment. Following review of the submitted site plan, the Township preconditioned construction approval on a requirement that Calisi construct a deceleration or bypass lane at the entrance of his establishment, in order to maintain a steady flow of traffic on the main thoroughfare. The Township claimed statutory authority to precondition approval under the *Township Rural Zoning Act*. The Court rejected that position and relied on *Arrowhead*.

The Court said:

> "By finding that the plaintiff was without authority to impose the requirements that it attempted, we necessarily must find that its theories for enforcing such requirements must fail." *Calisi, id.* at 787-88.

In *Calisi*, the Court of Appeals, noting the similarities between the facts and statutes involved, found it instructive to apply the judicial construction and rationale of the *Arrowhead* Court to the *Township Rural Zoning Act*. The *Driveway Act* presently relied on by the Road Commission also has, if not a direct relationship to the *County Road Law* and the *Subdivision Control Act*, at least "an obvious relationship to

the acts considered in *Arrowhead Development Co.* v *Livingston County Road Comm'n.*." *Calisi, supra* at 492.

C. Application Of Pending Legislation Indicates Intent Of The Legislature Not To Have The *Driveway Act* Apply To Road Improvements In The Right-Of-Way.

The promulgation of the rules for driveways far exceeded the rule-making contemplated by the *Driveway Act*, MCLA § 247.234; MSA § 9.140(24), as the Road Commission contends. The legislature made no provision for allocating the cost of the improvements which are "public" in nature. Therefore, it cannot be contended that the *Driveway Act* allows the Road Commission to legislate the allocation of costs to the developer in the LOYER case because the legislature did not intend that result.

The Michigan Legislature had before it Senate Bill No. 157 which was introduced March 18, 1987.[1]

It is clear that the legislature did not intend the *Driveway Act* to cover the situation claimed by Wayne

---

[1] "(1) The rules or ordinance may require the developer to dedicate land or pay fees or cash, or both, for completion of all or a portion of road improvements or operations required by a development. A rule or ordinance requiring a dedication or payment shall prescribe at which point in the procedure the dedication or payment is required. The value of land dedicated by a developer under this act shall be credited against the fee to be paid by that developer.

"(2) The rules or ordinance shall prescribe the basis on which a dedication or payment is required based on a traffic impact analysis of present road capacity and future traffic generated by the development and a cost estimate for the necessary road improvements or operations. A fee required under a rule or ordinance may include the cost of required traffic studies."

County when it proposed a Bill to deal with the exactions claimed from LOYER. *Arrowhead* sets out a clearly-delineated path: An administrative body may not impose off-site burdens on property pursuant to their own rule making. They must have a legislative mandate for compelling off-site improvements.

REASONS FOR GRANTING THE WRIT

I.

WHETHER A STATE *MUST* ENTERTAIN A CLAIM UNDER 42 USC § 1983?

Testa v *Katt*, 330 US 386, 391 (1904), set forth the following proposition while quoting *Claflin* v *Houseman*, 93 US 130, 137 (1876).

> "'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State Court.'"

Martinez v *California*, 444 US 277 (1980), adopted the general rule above stated and cited in footnote 8:

> "Conduct by persons acting under color of state law which is wrongful under 42 USC § 1983 or § 1985(3) cannot be immunized by state law." *Id.* at 284.

LOYER pled a Federal Civil Rights Act violation in its original State Court Complaint.

LOYER proved by the Road Commission's own admission:

a. No standard existed for apportioning the costs for off-site improvements; and

b. Private individuals and the public would be specifically benefitted on the opposite side of the road by the improvements required by LOYER without regard to the benefit/burden placed on LOYER, i.e., LOYER finishes the road for all, who now may develop their land without payment of the cost imposed on LOYER.

This was clearly discriminatory, arbitrary and capricious action by the State for which LOYER should have recovered. The Trial Court failed to address this issue. The Court of Appeals held that there was no discriminatory treatment without any analysis or discussion whatsoever.

The Michigan Courts' decision, in light of the foregoing can be analyzed in one of two ways:

1. The decision was clearly erroneous; or

2. The State merely ignored the claim without a discussion of the basis for their finding.

LOYER requires this Court's mandate if Federal Constitutional and Statutory claims are to have any meaningful analysis in the Michigan Courts, as opposed to merely perfunctory treatment.

II.

WHEN A GOVERNMENT AGENCY CREATES A SYSTEM OF FINANCING PUBLIC ROAD IMPROVEMENTS NOT OTHERWISE CREATED BY STATE STATUTE EMPOWERING THE AGENCY, HAS THE AGENCY USURPED THE LEGISLATIVE TAXING AUTHORITY OF THE STATE IN CONFLICT WITH THE PRONOUNCEMENTS OF THIS COURT'S DECISIONS?

The issue is whether a local government agency can define an exaction by an administrative rule. The answer

is: NO. The legislatures create exactions by "Police Power," "Eminent Domain" or "Taxing Authority." Administrative agencies merely implement what the legislature creates. To allow an administrative agency to start creating substantive rights subverts our entire constitutional process.

National Cable Television Assoc. v *United States and Federal Communications Commission*, 415 US 336, 94 S. Ct. 1146, 39 LEd2d 370 (1974), would not allow an administrative agency to assess an excessive fee for a permit because it was merely a disguised tax. Only the legislature has the power to tax.

The Michigan Court's decision in *LOYER* allows the Road Commission to become a taxing authority rather than a regulating authority.

LOYER was required to construct improvements for its neighbors and the County. This, the Road Commission could not force LOYER to do as part of obtaining a driveway permit because it amounted to a tax under the analysis of *National Cable*. The enabling legislation, the *Driveway Act*, set forth no standards for apportioning the cost of off-site improvements, nor was there a grant of such authority to the County, either express or implied in the Act.

National Cable set forth the following:

> "The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. It would be such a sharp break with our traditions to conclude that Congress has bestowed on a federal

> agency the taxing power . . . ." *National Cable, supra* at 342.

LOYER was taxed by the agency and it was upheld by the Michigan Court, thus creating the deprivation of federal constitutional rights to "Due Process" and "Equal Protection" of the law. This was an improper delegation to the Road Commission of "Taxing Authority" which was vested in the Michigan Legislature.

In *French* v *Barber Asphalt Paving Co.*, 184 US 324 (1901), the Court, quoting *Norwood* v *Baker*, 172 US 269 (1898), held:

> ". . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency. Dillon's Municipal Corporations, Vol. 2, § 752, 4th ed." *Id.* at 344.

In *LOYER* there was no legislation creating a "Driveway Tax" for off-site improvements — only administratively adopted rules. The rules had *no standards at all* for apportionment of off-site costs among private landowners and the public, who were both specially benefitted by the required improvements.

III.

WHEN A LOCAL GOVERNMENT AGENCY, PURSUANT TO AN ADMINISTRATIVE RULE, REGULATES THE ENTRY BY A PRIVATE PROPERTY DRIVEWAY TO AN UNIMPROVED PUBLIC STREET BY REQUIRING THE ENTERING OWNER TO CONSTRUCT OFF-SITE CAPITAL IMPROVEMENTS WITHOUT A STANDARD FOR APPORTIONING THE COST OF THOSE IMPROVEMENTS AMONG THE ABUTTING LANDOWNERS AND THE PUBLIC, HAS THE PRIVATE PROPERTY OWNER BEEN DEPRIVED OF "DUE PROCESS OF LAW" AND "EQUAL PROTECTION OF THE LAW" WITHIN THE MEANING OF THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION?

The Michigan Court's ruling in *LOYER* sets in place an unconstitutional action by the Road Commission.

The testimony at trial by the County Engineer was clear and unequivocal: THERE WAS NO STANDARD TO DETERMINE WHO HAS TO PAY WHAT AND WHEN. The Road Commission's own testimony establishes that there was no standard whatsoever.

The lack of a standard is a prima facie case for lack of "Due Process" and "Equal Protection." *Pan Fil, et al.* v *City of Detroit*, 246 Mich 149, 224 NW 616 (1929). See also 46 ALR 3d 127, Widening of City Street as Local Improvement Justifying Special Assessment of Adjacent Property.

Here there was testimony that the completion of the road and drain improvements were not only for public benefit but also private benefit in that opposite side of the road owners would now have to pay nothing for street or drain improvements to develop their property.

For example: Two people in the same position, i.e., holding undeveloped land, wishing to put in a driveway, are treated unequally. The imposition of the costs of all improvements against one is inapposite to the guaran-

tees of the "equal protection clause"; however, this is exactly what happened to LOYER and presumably anyone who is the first to put in a driveway in an undeveloped area.

Denial of certiorari or failure to review this issue will allow local governments to arbitrarily and capriciously declare, for example, that the first owners to install a driveway on a street will pay for road paving and drainage. Hardly a constitutionally protected action.

The test for "Due Process" of a tax is set forth in the line of cases from this Court as stated in *Frick* v *Pennsylvania*, 268 US 473 (1925), *Mt. St. Mary's Cemetery Assoc.* v *Mullins*, 248 US 501 (1919), *Dane* v *Jackson*, 256 US 589 (1921) and *Cass Farm Co.* v *Detroit*, 181 US 396 (1900).

In *LOYER* there was *no standard* set up to apportion the costs of off-site or public improvements on people installing driveways. The imposition of all costs on LOYER was a deprivation of "Due Process" because it amounted to confiscation, not the regulation of a driveway.

The administrative officials' actions, coupled with the State Court actions in *LOYER* were of such a nature as to constitute an intentional and deliberate attempt to violate the Federal Statutory Civil Rights and Constitutional Rights of LOYER.

The impact on LOYER or any developer who is first to develop in an area where the infrastructure is not in place is unequal to other developers who, for example, seek to develop across the road one day after LOYER's improvements are in place. They are both in the same taxing unit; however, the first in time is penalized and not treated equally to others in the same unit.

IV.

WHEN A LOCAL GOVERNMENT AGENCY DENIES ACCESS TO A PUBLIC ROAD TO AN OWNER OF PRIVATE PROPERTY BY DEMANDING AN EXACTION NOT DEFINED BY THE LEGISLATION, HAS THERE BEEN A TAKING OF THE USE OF THE PROPERTY REQUIRING THE APPLICATION OF THE "JUST COMPENSATION" CLAUSE FOR THE REGULATORY TAKING OF THE USE OF THE PROPERTY?

"Just Compensation" as a remedy in regulatory taking cases in light of the holdings of this Court in the cases of *First English Evangelical Lutheran Church of Glendale* v *County of Los Angeles, California*, 482 US 304, 96 LEd2d 250, 107 S.Ct. 2378 (1987), and *Nollan* v *California Coastal Commission*, 483 US 825, 107 S.Ct. 3141 (1987), would be applicable to *LOYER*. *LOYER* more clearly resembles *First English* in that a non-invasive regulatory taking occurred which deprived LOYER of all use of the property. While this "Taking" occurred outside the Zoning arena, it was nevertheless as devastating and final as the action taken in *First English*.

This issue was raised and briefed throughout these proceedings.

If a government agency stops a person from using their property they are taking it from that person if there is no authority for such action.

The government acts with color of authority. The power thus derived gives it an intimidating and overwhelming advantage over the individual. Individuals are nearly powerless to wage long legal struggles against government due to cost or time. These are the stark realities of life.

To allow a government to avoid paying compensation for prohibiting the use of property upon a finding that

the conduct of the government was improper would deny meaningful private property rights to everyone.

The local government authorities would be more inclined to act with measured restraint as opposed to uninhibited arrogance, if they were facing money damages for their unlawful actions.

The *LOYER* case takes this Court to a watershed in the development of "Taking Without Just Compensation" cases.

In *LOYER*, this Court merely has to consider whether the *improper* conduct of a local government agency prohibiting use of land constitutes a taking within the meaning of the V and XIV Amendments.

If, as in *LOYER*, the *improper* conduct prohibited use, then compensation should be paid.

The Michigan Courts never reached this issue. The Michigan Courts have allowed the Road Commissioners to continue their abusive practices in violation of Federal Statutory and Constitutional mandates to the contrary.

CONCLUSION

The analysis is clear:

Where an exaction is contemplated, a legislative branch of government must define the exaction, either under its "Police Power," "Eminent Domain," "Taxing Authority," or some other constitutional authority granted to it.

An administrative agency may define the character of the exaction, i.e., the type of concrete, pipe, or stone, once granted. However, the administrative agency may not create the exaction itself because it has no authority to do so. It is a legislative function.

Furthermore, the legislature must create a standard within the legislation creating the exaction to guide the administrative body in carrying out the Act itself.

This Court's intervention is mandated if the people of the State of Michigan are to have meaningful protection of their federal constitutional and statutory rights in view of the State Courts' refusal to consider them.

It seems a logical conclusion that a State should determine its own law in a federal statutory and constitutional setting in order to allow the State to "get its own house in order," rather than allowing federal courts to define substantive state law. Only when abuses occur, as in the *LOYER* case, should the federal courts step in to protect against such abuse.

Monetary damages should be available to aggrieved parties in those case where a non-invasive regulatory taking has in fact occurred. LOYER's property was no less taken than if the County came in and occupied it.

If this Court declines to hear this case it could signal the state courts to disrupt their own system of *Stare Decisis* and Jurisprudence in order to avoid addressing federal issues, as the Michigan Courts have done in the *LOYER* case.

Respectfully submitted,

By: /s/ M. GARY HOLLAND
Counsel of Record
23394 Goddard Road
Taylor, Michigan 48101
(313) 292-0288

Attorney for Petitioner,
LOYER EDUCATIONAL TRUST,
LARRY McDONALD, TRUSTEE

DATED: June 26, 1989

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(State of Michigan — Supreme Court)

(Received June 19, 1989)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff/Appellant, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Supreme Court No. 83452; Court of Appeals No. 93959; Wayne County Circuit Court No. 83334841 CZ)

Notice is hereby given that Loyer Educational Trust, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Michigan Supreme Court dismissing the Motion for Rehearing of Application for Leave to Appeal entered March 29, 1989.

This Appeal is taken pursuant to Title 28, USC Section 1257.

M. Gary Holland P23197
Attorney at Law
23394 Goddard Road
Taylor, Michigan 48180

DATED: June 19, 1989

PROOF OF MAILING

STATE OF MICHIGAN
COUNTY OF WAYNE — ss

M. GARY HOLLAND, being first duly sworn, deposes and says that on the 19th day of June, 1989, he personally served a true copy of: NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon the Clerk of the Michigan Supreme Court, 2nd Floor Law Building, 525 W. Ottawa, Lansing, Michigan, and mailed a true copy to:

Lawrence R. Ternan
Beier, Howlett, Ternan, Jones, Shea & Hafeli, P.C.
Attorney for Michigan Municipal League
74 W. Long Lake Road, Ste. 1
Bloomfield Hills, MI 48013

Lambro Niforos
Attorney for Defendants/Appellees Road Commission
600 Randolph, 2nd Floor
Detroit, MI 48226

by depositing said true copies in an envelope properly addressed as aforesaid, sealing same and affixing thereto appropriate first class postage, and depositing the same in a U.S. mail receptacle located in the City of Taylor, Michigan, on said date.

/s/ M. Gary Holland

Subscribed and sworn to before me
this 19th day of June, 1989.
/s/ Joyce Wooten
Notary Public, Wayne County, Michigan
Commission expires: 3/5/90

APPENDIX B

ORDER

(State of Michigan — Supreme Court)

(Entered March 29, 1989)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, v WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, and THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants-Appellees — SC: 83452; COA: 93959; LC: 83-334841-CZ)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the motion for reconsideration of this Court's order of December 29, 1988 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

(*Certification Omitted*)

APPENDIX C

MOTION FOR RECONSIDERATION

(State of Michigan — Supreme Court)

(Received January 18, 1989)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, vs WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Supreme Court No. 83452, Court of Appeals No. 93959, Wayne County Circuit Court No. 83 334 841 CZ)

Plaintiff/Appellant states in support of its MOTION FOR RECONSIDERATION:

1. On December 29, 1988, this Court issued its Order in this case.

2. The Court ordered as follows:

> "On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for leave to file a brief amicus curiae is GRANTED."

3. The Michigan Municipal League filed a Motion to be allowed to be heard in this case and indicated in their Motion in Paragraph 2, Page 2:

> ". . . this cause involves a question of great importance to all Municipal Corporations in the state."

4. This Court granted the Michigan Municipal League's Motion to File a Brief Amicus Curiae, but denied the Application for Leave to Appeal.

5. The Defendant in this case, Wayne County Road Commission, failed to file an Answer to Plaintiff's Application for Leave to Appeal.

6. The Michigan Court of Appeals issued an Opinion in this matter adverse to the Plaintiff/Appellant.

7. The Real Property Section of the State Bar of Michigan in conjunction with the Municipal Zoning Section offered a Seminar in the summer of 1988 covering various topics.

8. At that Seminar the Real Property Section and Michigan Zoning Section of the State Bar of Michigan discussed the Court of Appeals' Decision in the *Loyer* v *Wayne County Road Commission* case.

9. The Real Property Section and Michigan Zoning Section of the State Bar of Michigan concurred that the Court of Appeals Decision in the *Loyer* case was *INCORRECT.*

10. The State Bar of Michigan agreed that the Court of Appeals legal determination was not the law and that the principles of *Arrowhead Development Co.* v *Livingston County Road Comm'n.*, 413 Mich 505, 322 NW2d, 702 (1982) and *Charter Township of Harrison* v *Calisi*, 121 Mich App 777, 329 NW2d 488 (1982), are applicable to the *Loyer* case.

11. Attorney for Plaintiff/Appellant contacted the Real Property Section in view of the fact that the Michigan Municipal League had hired counsel to represent their political interests in this case pending before the Michigan Supreme Court.

12. The Real Property Section of the State Bar of Michigan has tacitly agreed to file a Brief in support of the opposite position from the Michigan Municipal League in the *Loyer* case if leave to appeal is granted by this Court.

13. The State Bar of Michigan, Real Property Section was unable to file a Brief on the Application for Leave to Appeal, but would write a Brief, if this Honorable Court would reconsider its position and grant Application for Leave to Appeal in this case.

14. The State Bar of Michigan Real Property Section is not a political entity as the Michigan Municipal League, but is merely concerned with having a correct decision founded on the law.

15. The determination sought by the Michigan Municipal League is clearly one-sided and not in the best interest of the people of the State of Michigan.

16. The municipalities in the State of Michigan are afraid of an adverse ruling in the *Loyer* case due to the fact that they have carved out an exception to State Law by taxing private individuals in order to finance or find sources of financing not presently available for the roads and drainage systems in the State of Michigan.

17. The *Loyer* case represents a unique situation; where the infrastructure is inadequate i.e. primitive roads and drainage for any type of development, the Court of Appeals Decision allows the municipality under the guise of *The Driveways, Banners and Parades, Act, 200, 1969,* Mich. Comp. Laws. Ann § 224.21; Mich. Stat. Ann. § 9.140(24), to shift the costs of developing the infrastructure to a developer who desires to develop its property in the area.

18. The problem that this creates is that a single developer could have the entire costs of the infrastructure shifted to it without any chance to recoup the costs from either the public or the landowners adjacent to the area or across the street from the area.

19. Obviously, Loyer has no recourse against the property owner on the opposite side of the street for the development costs for completing the road adjacent to its property, nor does it have the opportunity to recover or recoup compensation for the use to which the public will put the infrastructure.

20. It must be asserted here that Loyer offered to improve its side of the road, but rejected the improvements on the opposite side of the road.

21. The Decisions in *Calisi*, and *Arrowhead*, while not specifically speaking to *The Driveway Act*, nevertheless established a standard by which improvements could be financed in the public right of way. These are by special assessment district or the general taxing power of the County.

22. *The Driveway Act*, id., contained no language *APPORTIONING* the cost of improvements between the various landowners and/or the public and the developer. Nor did Wayne County develop a standard for apportioning costs in its regulations governing driveways. This is mandated by *Arrowhead* and *Calisi*.

23. In the *Loyer* case, the undeveloped nature of the area created a burden on the infrastructure.

24. The question the Supreme Court has to direct itself to is very clear:

> May a County force a developer in an area to pay the entire costs of creating an infrastructure - as

the Court of Appeals allowed through its ruling - or should those costs be apportioned among the public and adjoining landowners in some reasonable fashion where there is an inadequate infrastructure in place?

25. Plaintiff/Appellant submits that authority for this action does not lie in *The Driveway Act.*

26. *Loyer* creates a trilogy with *Arrowhead* and *Calisi* defining the rights of the individuals vis-a-vis development of offsite improvements.

27. The Court of Appeals' decision is clearly erroneous, unconstitutional and against the great weight of authority.

A. The Court of Appeals' decision is contrary to this Court's decision in *Arrowhead* and the Court of Appeals own holding in *Calisi* in that apportionment of the cost of offsite improvements is not found in *The Driveway Act.*

B. The Court of Appeals' decision upholding the County's action constituted a taking without adequate compensation by forcing *Loyer* to put in improvements for both public and private benefit.

C. The Court of Appeals' decision upholding the County's action was discriminatory and violative of due process in that *no standard* was established to apportion costs of offsite improvements.

D. The Court of Appeals' decision interpreting *The Driveway Act* broadens the authority to regulate driveways into a method of financing roads and drains. This is not expressed in *The Driveway Act* nor can it be fairly implied.

28. The hypothetical example given below points out the error in analysis in the Court of Appeals' decision:

29. Assume now that half of the people on Sibley road want to develop their property and half do not.

30. Also, assume that the half that want to improve their property are on the south side of the road and the half that do not want to improve their property are on the north side of the road.

31. Under the position advocated by the Michigan Municipal League and Wayne County, the half on the south side of the road, pursuant to the *The Driveway Act*, id., would have to put in all of the improvements, which would benefit all of the properties on the north side of the road and thereby create an infrastructure for everyone, i.e., the public and those property owners on the north side of the road, without compensation to the south side landowners.

32. This is not an allocation of costs which is either fair or legally correct.

33. These issues are of grave importance to the orderly development of the State of Michigan.

34. In view of the fact that both the Michigan Municipal League and the State Bar Real Property Section want to join the affray is further indication of the importance of a full hearing on the issues presented by *Loyer*.

WHEREFORE, Plaintiff/Appellant, Loyer, requests that this Honorable Court grant its Motion for Reconsideration and allow the parties and amicus curiae to file briefs and have oral arguments on the issues presented by this case.

Respectfully submitted,

M. Gary Holland
Attorney for Plaintiff/Appellant

AFFIDAVIT

STATE OF MICHIGAN
COUNTY OF WAYNE — ss

On this 18th day of January, 1989, before me personally appeared M. GARY HOLLAND, who made oath that he has read the foregoing MOTION FOR RECONSIDERATION, by him subscribed, and that the contents thereof are true except as to those matters stated to be upon information and belief, and as to those matters he believes them to be true.

Joyce Wooten, Notary Public
Wayne County, Michigan
My Commission Expires: 3/5/90

APPENDIX D

ORDER

(State of Michigan — Supreme Court)

(Entered December 29, 1989)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, v WAYNE COUNTY ROAD COMMISSION, THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, Individually, Jointly and Severally, now County of Wayne, its Successor in Interest, Defendants-Appellees, and BROWNSTOWN TOWNSHIP, Defendant — SC: 83452; CoA: 93959; LC: 83-334841-CZ)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for leave to file a brief amicus curiae is GRANTED.

(Certification Omitted)

APPENDIX E

APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, vs WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Supreme Court No. _____; Court of Appeals No. 93959; Wayne County Circuit Court No. 83 334 841 CZ)

Now comes Plaintiff/Appellant, by and through its attorney, M. GARY HOLLAND, and requests that this Court grant its Application for Leave to Appeal from a decision of the Court of Appeals dated May 17, 1988 in the above captioned case, and in support of its application says:

1. This action was commenced in Wayne County Circuit Court in November of 1983.

2. Plaintiff/Appellant is the owner of land upon which it built a building for use as a Shopping Center pursuant to a building permit obtained from Brownstown Township. It brought the action against the Defendant/Appellee, WAYNE COUNTY ROAD COMMISSION, seeking a Writ of Mandamus compelling the Road Commission to issue a driveway permit without the requirement of exacting costly road improvements from the Plaintiff/Appellant. In the alternative, Plaintiff/Appellant requested an Injunction barring the County from interfering with the opening of Plaintiff/Appellant's driveway.

3. Plaintiff/Appellant requested money damages for the taking by the WAYNE COUNTY ROAD COMMISSION in closing the Plaintiff/Appellant's shopping center, and for requiring Plaintiff/Appellant to make improvements for both public and private landowners before Plaintiff/Appellant was allowed reasonable access to the road.

4. Plaintiff/Appellant also requested that the WAYNE COUNTY ROAD COMMISSION be found in violation of Michigan and Federal Civil Rights Acts in addition to denial of equal protection under the law in its discriminatory treatment of Plaintiff/Appellant by allowing a competitor to open down the street from Plaintiff/Appellant without a standard for exacting the same costs from the competing developer.

5. The Plaintiff/Appellant's position is that the Defendant/Appellee had no authority to compel Plaintiff/Appellant to make major road improvements as a precondition to obtaining a driveway permit. The improvements consisted of the following:

A. Paving a passing lane on the opposite side of the street from Plaintiff/Appellant's project, a 23,000 square foot strip shopping center.

B. Paving a private gravel road intersection as part of the passing lane requirement, also located on the opposite side of the street abutting the Sibley Road Right of Way

C. Relocating a county drain or enclosing it as a requirement in installing the passing lane, also on the opposite side of the street.

D. Plaintiff/Appellant estimated the cost of these improvements to exceed ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, where the County determined that these improvements would cost FORTY THOUSAND ($40,000.00) DOLLARS.

6. The WAYNE COUNTY ROAD COMMISSION took the position that it could promulgate rules under *The Driveway Act*, MSA 9.140 (21), and did so, thus requiring the public road improvements sought from Plaintiff/Appellant as a precondition to securing a driveway permit.

7. The Wayne County Circuit Court denied Plaintiff/Appellant's motion for Writ of Mandamus or Injunction.

8. The denial of that motion was appealed to the Court of Appeals.

9. The Court of Appeals dismissed the appeal as interlocutory in that a trial on money damages had to occur before a final judgment was rendered.

10. The case went to trial before Judge RICHARD DUNN of the Wayne County Circuit Court who issued an opinion of no cause of action dated June 19, 1986.

11. The Plaintiff/Appellant appealed from the Circuit Court's decision which said in part that the County had the authority under the *Driveway Act* to compel the Plaintiff/Appellant to make the improvements and pay for them as a condition of obtaining a driveway permit.

12. The Court of Appeals rendered a decision on the Appeal of the Circuit Court's Decision which was dated May 17, 1988, and which upheld the Lower Court.

GROUNDS FOR APPEAL

13. Plaintiff/Appellant submits the following grounds for appeal pursuant to the provisions of MCR 7.302(B):

a. This appeal is of significant public interest and is against one of the subdivisions of the state. MCR 7.302(B)(2).

(i) It involves the issue of whether a subdivision of the state, the County Road Commission, pursuant to *The Driveway Act*, MCLA 247.234, MSA 9.140(21), can require an applicant for a driveway permit to make public road improvements on the opposite side of the street at his own expense where the Statute contains no provision for apportionment of the cost of those improvements between the applicant, other landowners and the public. These issues are important because they define the authority of the County Road Commissions to require exactions from individuals seeking to put in driveways.

(ii) Moreover, whether such requirement is a taking without compensation.

Furthermore, the Court of Appeals Decision in *Loyer* could cause a chilling effect on underdeveloped areas of the state due to its uncertain impact on the first to develop in an area.

b. This appeal involves legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3):

(i) Whether the WAYNE COUNTY ROAD COMMISSION can shift the cost of public improvements to Plaintiff/Appellant in the absence of clear legislative intent requiring that result.

(ii) Whether the requirement that Plaintiff/Appellant make public improvements without compensation as a condition of

obtaining a permit is a taking under Article 10§2 of the Michigan Constitution and 5th Amendment as applied through the 14th Amendment of the United States Constitution. The United States Supreme Court in *First English Evangelical Lutheran Church of Glendale* v *County of Los Angeles, California*, 96 LE2d 250, 107 S. Ct. 2378 (1987) and the Michigan Court of Appeals in *Poirer* v *Grand Blanc Township, et al*, Lawyers Weekly No. MA-5779, have held that such requirements as applies to zoning laws constituted an unlawful taking which required compensation. This issue has been raised and briefed throughout these proceedings.

(iii) Even assuming, *arguendo*, that a state subdivision can require such public improvements to be made, can it do so without any standards for payment and in a manner that results in arbitrary and discriminatory actions? Here, Plaintiff/Appellant will be required to make and pay for improvements that are not required of others and that will benefit other landowners and the public without a standard of payment.

c. The Court of Appeals decisions here conflicts with this Court's decision in *Arrowhead Development Co.* v *Livingston County Road Comm'n*, 413 Mich 505, 322 NW2d 702 (1982), and with the Court of Appeals decision in *Charter Township of Harrison* v *Calisi*, 121 Mich App 777, 329 NW2d 488 (1982), MCR 7.302 (B)(5). In *Arrowhead*, the Michigan Supreme Court held that since the *Subdivision Control Act*, MCLA 560.183, MSA 26.430 (183), did not contain a provision apportioning costs, the Act did not require nor did the Legisla-

ture intend a subdivision developer to put in public road improvements at his own expense as a precondition to obtaining approval of a Plat. The same reasoning was used by the Court of Appeals in *Calisi*, which applied *Arrowhead;* there a township could not require an individual to construct public improvements under the *Township Rural Zoning Act*, MCLA 125.286, MSA 5.2963, as the Act did not set forth a system of apportioning the costs of public road improvements and the only method of financing these were through the general taxing power of the County or a special assessment district. So, too, in *Loyer, The Driveway Act* is silent as to any apportionment of costs. Thus, the decision by the Court of Appeals in this case is inconsistent with *Arrowhead* and *Calisi.*

d. The decision of the Court of Appeals in *Loyer* is clearly erroneous and will cause material injustice. MCR 7.302(B)(5). The facts relied upon by the Court of Appeals are inconsistent with the lower court's findings of fact. The decision summarily dismissed the reasoning and holdings of *Arrowhead* and *Calisi, supra*, thereby allowing the WAYNE COUNTY ROAD COMMISSION to mandate a private individual to construct public improvements at his own expense as a precondition to obtaining a driveway permit under The Driveway Act, even though such action would be unlawful under the *Subdivision Control Act* or the *Township Rural Zoning Act.* Material injustice will result to Plaintiff/Appellant from the Court of Appeals decision in that it will be forced to either:

(i) make improvements at its own expense to benefit the public and other private land-

owners, the cost of which will threaten the economic feasibility of the development, or

(ii) abandon the development at a great economic loss.

RELIEF REQUESTED

LOYER EDUCATIONAL TRUST, respectfully requests that this Court find that the defendant, WAYNE COUNTY ROAD COMMISSION, is without statutory authority to precondition the granting of a driveway permit on the installation of the requested off-site road improvements by plaintiff, LOYER EDUCATIONAL TRUST.

Appellant further requests that this Court direct the WAYNE COUNTY ROAD COMMISSION to issue to the appellant, LOYER EDUCATIONAL TRUST, a permit in order to complete driveway construction and open the shopping facility for the public.

Plaintiff/Appellant further requests an injunction barring WAYNE COUNTY ROAD COMMISSION from interfering with the orderly operation of its Shopping Center.

Further, that this Court, find that the WAYNE COUNTY ROAD COMMISSION has, indeed, exacted a taking from Loyer without compensation and refer the case for a hearing to determine the continuing damages to LOYER EDUCATIONAL TRUST.

Respectfully,

M. Gary Holland P23197
Attorney for Plaintiff/Appellant
23394 Goddard Road
Taylor, Michigan 48180

APPENDIX F

OPINION

(State of Michigan — Court of Appeals)

(Filed May 17, 1988)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, v WAYNE COUNTY ROAD COMMISSION, the BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants-Appellees, and BROWNSTOWN TOWNSHIP, Defendant — No. 93959)

BEFORE: D.E. Holbrook, Jr., P.J.,
H. Hood and N.J. Kaufman*, JJ.

PER CURIAM *FOR PUBLICATION*

Plaintiff, Loyer Educational Trust, brought suit against the Wayne County Road Commission, the Board of Wayne County Road Commissioners, the individual commissioners and Brownstown Township, first seeking a preliminary injunction or writ of mandamus and later seeking money damages caused by the Road Commission's denial of a driveway permit to allow access to plaintiff's commercial development. Plaintiff's motion for a preliminary injunction or in the alternative a writ of mandamus was denied February 21, 1984, since the trial court was unconvinced that there was no appropriate legal relief available. That decision was appealed

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* Retired Court of Appeals Judge, sitting on the Court of Appeals by assignment.

to this Court and defendants filed a motion to dismiss. This Court granted defendants' motion since the denial of a preliminary injunction or writ of mandamus is not an appealable final judgment. Defendant Brownstown Township was dismissed from the suit upon the court's grant of summary disposition for plaintiff's failure to state a claim upon which relief can be granted.

In May 1986, the suit for money damages was heard by the Wayne County Circuit Court. After taking under advisement the evidence presented, the arguments, and the briefs provided by the parties, the court issued an opinion finding that plaintiff was not entitled to injunctive relief, a writ of mandamus, or money damages since defendants' conduct was not wrongful. From its judgment of no cause of action, plaintiff now appeals as of right, claiming the court's decision was legally erroneous.

The Loyer Educational Trust was established by LaVern Loyer as an education fund for his children. After his children had been educated, Loyer found that money remained in the trust which would eventually be distributed to the children. The trustee decided that a real estate development would be a good investment for the trust and hired Loyer to be the contractor of a project which became known as the Sibley Plaza Shopping Center.

Defendant constructed a shell building consisting of between 23,000 and 24,000 square feet on approximately 2 1/2 acres of land with 365-foot frontage on Sibley Road, between I-75 and Telegraph. On April 1, 1981, when the building was approximately half done, plaintiff applied, through his agent, to defendant Wayne County Road Commission, for a permit to connect to water and sewer lines and to connect a driveway to Sibley Road. The defendants stated that plaintiff could get a permit

only if plaintiff made certain modifications to the road right-of-way, including a passing lane on the north (opposite) side of Sibley Road and a widening of the pavement in front of plaintiff's property on the south side of Sibley Road as a deceleration lane, to prevent traffic congestion.

Plaintiff then constructed a driveway from the Sibley Plaza property onto a private road which was west of the shopping center site. This private road led to Loyer Construction, plaintiff's construction company which was situated behind the proposed shopping center. Construction of this driveway was unauthorized by the Road Commission. Defendants notified plaintiff that this construction was unauthorized and that a permit would be necessary. On October 14, 1981, plaintiff, under Sibley Plaza letterhead, reapplied for access to water and sewer, showing its new access to Sibley Road via the private drive leading to Loyer Construction. Defendant responded that permit could not be issued until certain modifications were made to the Sibley Road right-of-way, the Van Cleef drain and Emit Street, a private drive opposite plaintiff's property. These modifications included the addition of a passing lane on the north side of Sibley road and the movement or enclosure of the Van Cleef drain. The additional work on the drain and private drive were required because the newly proposed placement of plaintiff's driveway required the passing lane to disrupt this drain and the intersection of Emit Street with Sibley Road. Defendants based their modification requirement upon a set of rules entitled Rules, Standards and Procedures for Driveways within Wayne County Road Commission Right-of-Way, which was promulgated pursuant the Michigan Driveways, Banners, Events and Parades Act, MCL 247.321 *et seq.*; MSA 9.140(21) *et seq.*

Plaintiff refused to make the required modifications, claiming that the cost would be prohibitive and that the Road Commission had no authority to require it to pay for the improvement to the north side of Sibley Road. Plaintiff estimated that the cost of the required improvements would be $150,000 to $200,000 which would be approximately thirty percent of the entire cost of the project. Defendant, on the other hand, testified that the required improvement on the north side of the road would be between $40,000 and $50,000. Although defendants offered to let plaintiff defer the construction of the disputed improvements through the provision of letters of credit, plaintiff refused and instead proceeded to trial seeking injunctive relief or a writ of mandamus and damages.

Evidence was presented that the 24-hour traffic volume on Sibley Road during a test conducted during 1981 was 15,280 vehicles. It was projected that there would be eighty-three left turns during a peak traffic hour. There also was testimony that the passing lane would be required to safely avoid accidents.

On appeal, plaintiff claims that the Road Commission may not, pursuant to the Driveways, Banner, Events and Parades Act, MCL 247.321 *et seq*; MSA 9.140(21) *et seq.*, compel a private developer to install a passing lane and related improvements as a precondition to the granting of a driving permit. We disagree.

The purpose of the Driveways, Banners, Events and Parades Act is to regulate driveways banners, events, and parades upon highways, to promulgate rules for the regulation, and to prescribe requirements for the issuance of permits therefore. 1969 PA 200, Statement of Purpose.

Section 2 of this Act, MCL 247.322; MSA 9.140(22) provides:

> *"No driveway, banner or parade is lawful except pursuant to a permit issued in accordance with this act* unless otherwise provided. Nothing in this act shall be construed to prevent the application of the provisions of any other statute of this state or any local ordinance which is more restrictive than this act nor to preclude any city or village from requiring city or village permits with respect to any street or highway within its corporate limits. No permit shall be issued pursuant to this act unless there is compliance with other provisions of law or ordinances." (emphasis added).

Section 4 of the Act, MCL 247.324; MSA 9.140(24) provides:

> *"Permits for driveways shall be granted in conformity with rules promulgated by the highway authority which shall be consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest.* Rules shall prescribe reasonable standards for the design and the location of driveways and may require that driveways shall be hard-surfaced. The provisions of this section shall not be deemed to deny reasonable access to a nonlimited access highways." (emphasis added).

Section 5 of the Act, MCL 247.325; MSA 9.140(25) provides:

> "The department of state highways shall make rules necessary for the administration of this act in accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sec-

> tions 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Complied Laws of 1948. *The boards of county road commissioners may adopt by reference the rules, in whole or in part, of the department of state highways or may adopt its own rules after a public hearing of which notice has been given by publication at least twice in a newspaper circulated in the county not more than 30 days nor less than 7 days prior to the hearing.*" (emphasis added).

Finally, section 6 of the Act, MCL 247.326; MSA 9.140(26) provides:

> "A permit shall not be issued unless all the requirements of this act, and of rules made pursuant to section 5, are met. A permit may be revoked by the highway authority issuing it if at any time the permitted object, use, or activity fails to meet the requirements of this act or rules made in accordance with section 5." (footnote omitted).

In the instant case, the parties stipulated that the rules and regulations adopted by the Wayne County Road Commission were adopted pursuant to the statute after proper publication and hearing. There also was no dispute that the rules were adopted for the purpose of efficient and safe access to highways from private property. As required by § 4 of the Act and the Wayne County rules, a determination of the requirements of each applicant is based upon traffic volume, drainage requirements, the type of use contemplated by the adjoining land and other requirements in the public interest. The Wayne County Road Commission rules state that a

passing lane on the opposite side of the highway from a proposed commercial, industrial or multiple residential driveway be required when traffic volume reaches at least 7,700 vehicles in two hours, with twenty or more peak-hour left turns. In the instant case, there was estimated to be a 24-hour volume in 1981 of 15,280 vehicles and a projected eighty-three left turns during peak-hour traffic.

Defendants determined that the commercial nature of the development and the volume of traffic on Sibley Road necessitated the installation of a passing lane on the opposite side of the road to allow for safe and efficient left-turn traffic. Because of the location of plaintiff's driveway in relation to Emit Street and the Van Cleef drain some modifications to those structures would also be required.

We believe that the rules and procedures promulgated by defendants were well within the authority conferred upon them by the Driveways, Banner, Events and Parades Act and satisfied the purpose of the Act. Furthermore, the improvements required of plaintiff by defendant were consistent with their published, properly-promulgated rules.

Plaintiff argues that two recent cases dealing with similar circumstances should be controlling by analogy. However, *Arrowhead Development Co* v *Livingston Co Road Comm*, 413 Mich 505; 322 NW2d 702 (1982) and *Charter Twp of Harrison* v *Calisi*, 121 Mich App 777; 329 NW2d 488 (1982) are not controlling in that they involved different statutes and materially different facts.

Next, plaintiff claims that the denial of his driveway permit constitutes a taking of private property without just compensation in contravention of Const 1963, art 10, § 2 and the 14th Amendment to the United States

Constitution, and that it was a denial of equal protection guaranteed by Const 1963, art 1, §§ 2 and 17 and the 14th Amendment of the United States Constitution. We disagree with plaintiff that the act of denying plaintiff a permit unless he made the improvements was a taking. In regard to plaintiff's equal protection claim, plaintiff claims he was treated differently than a nearby landowner, Koza. However, we note that Koza agreed to accept the offer to defer construction until he was more financially able, while plaintiff was offered the same arrangement but declined. In addition, the site chosen by Koza did not require as much work for the installation of a passing lane and some of the work required by Koza's site was completed by the Michigan Department of Transportation for unrelated reasons. Therefore, we find no disparate treatment.

The decision of the trial court is affirmed.

AFFIRMED.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Nathan J. Kaufman

APPENDIX G

JUDGMENT FOR DEFENDANTS, WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY

(State of Michigan — Circuit Court — County of Wayne)

(Dated July 1, 1986)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, Trustee, Plaintiff, v WAYNE COUNTY ROAD COMMISSION, and the BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, Individually and Severally, Defendants – C.A. No. 83 334-841CZ; HON. RICHARD D. DUNN)

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan, on: JULY 1, 1986.

PRESENT: RICHARD D. DUNN,
CIRCUIT COURT JUDGE.

This matter having been tried by the Court, the Court having rendered its opinion, it is adjudged in accordance with the Opinion of the Court that Plaintiffs have no cause for action. The Court gives no costs, a public question being involved.

/s/ RICHARD D. DUNN
CIRCUIT COURT JUDGE

Approved:

/s/ M. GARY HOLLAND, ESQ./*LN, per telephone authority 7-1-86*, Attorney for Plaintiff, 23394 Goddard Road, Taylor, MI 48180;

/s/ LAMBRO NIFOROS, ESQ., Attorney for Defendants, 701 City-County Building, Detroit, MI 48226.

DATED: July 1, 1986

(*Certification Omitted*)

APPENDIX H

OPINION OF COURT

(State of Michigan — Circuit Court — County of Wayne)

(Dated June 19, 1986)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, Trustee, Plaintiff-Appellant, v. WAYNE COUNTY ROAD COMMISSION, and the BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES and HAROLD H. BONDY, Individually and Severally, Defendants — Civil Action No. 83334-841CZ; Hon. Richard D. Dunn (P-13025))

This is an action by the Loyer Educational Trust and its Trustee, Larry McDonald, the plaintiffs herein, against the Wayne County Road Commission and the individual Commission members, the defendants herein, for the issuance of a writ of mandamus, injunctive relief and money damages. The matter was tried by the Court and disposition was withheld pending an opinion by the Court. The Court opines:

FACTS

Sometime prior to 1981, plaintiffs began construction of a commercial shopping center on Sibley Road in Brownstown Township between Interstate 75 and Telegraph Road. The property on which the shopping center is located consists of approximately 3 1/2 acres, with a 350 foot frontage on the south side of Sibley Road. Sibley Road itself is a two lane county road (i.e., one lane westbound, and one lane eastbound) with a posted speed of 45 mph.

When construction was almost completed, plaintiff applied to the defendant, on April 1, 1981, for a permit seeking to install and connect utility lines and a driveway onto Sibley over the Sibley Road right-of-way. In response, defendants notified plaintiffs that they would be required to construct a passing lane opposite the driveway in order to accommodate left turns into the shopping center.

Plaintiffs responded by relocating its driveway into the shopping center from the Sibley Road frontage to a private road west of the shopping center which intersected Sibley Road. Neither the private road, nor the driveway however, had been constructed under the requisite permits.

To obtain these permits plaintiff once again applied to defendants to issue permits. Again the defendants informed plaintiffs that they would be required to construct a passing lane and the closing of a drain on the north side of Sibley in order to accommodate left hand turns.

Approximately two years thereafter, this case was commenced. Although various forms of relief were requested, the issue central to all was whether defendants could legitimately require plaintiffs to construct the passing lane as a precondition to defendants issuing a driveway permit. It is to this dispositive issue that the Court now turns.

ANALYSIS

The requirement that plaintiffs obtain a permit in order to construct their driveway and link it with Sibley Road is a statutory one.

Section 2 of the Driveways, Banners, Events and Parades Act (hereinafter, the Act), MCLA 247.322, pro-

vides in relevant part: "No driveway . . . is lawful except pursuant to a permit issued in accordance with this act." "Driveway" is defined in Section 1(a) of the Act, MCLA 247.321(a) to mean "a driveway, lane, road or any other way providing vehicular access to or from the highway from or to property adjoining the highway . . ."

Inasmuch as plaintiff's private drive and driveway are means of "providing vehicular access to and from the highway" relative to plaintiffs' property which adjoins Sibley Road, it is clear that before plaintiffs could lawfully construct there driveways they were required to seek and obtain a permit. Additionally, because Sibley Road is a county road, the relevant highway authority to issue the permit would have to be the defendants in the instant case.

In regard to the issuing of permits, the Act authorizes a highway authority, such as defendants, to make rules necessary for the administration of the Act. Section 5 of the Act, MCLA 247.325. Rules that are promulgated by the highway authority are to be "consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest."

Section 6 of the Act, MCLA 247.326 further provides in part that "a permit shall not be issued unless all requirements . . . of rules made pursuant to Sec. 5 are met."

In the case at bar, defendants did adopt rules applicable to the issuing of driveway permits.

The *"Rules, Standards, and Procedures for Driveways within Wayne County Road Commission Right of Way* provides at page 10:

> "The permit applicant shall provide a passing lane on the side of the highway directly opposite a proposed commercial, industrial, apartment driveway or other heavy traffic generators when warranted in accordance with the highway vehicle volume and anticipated peak hour vehicle left turns from the highway as shown in Figure 7. When other conditions such as horizontal and vertical sight distance, traffic signal location and other physical factors directly affect public safety, a passing lane shall be required. Minimum dimensions for a passing lane are shown in Figure 8."

Under the foregoing rule, the defendants are clearly authorized and indeed mandated to require a passing lane be constructed when, due to the physical characteristics of the road into which the driveway empties, the public safety is affected.

In the Court's opinion the above rule is one which the defendants could lawfully adopt under the Act. Certainly, all would concede that the presence of a driveway on a highway will always have the potential for interrupting traffic on the highway due to motorists stopping and turning off of the highway to go into the driveway. Additionally, it may be presumed that driveways to commercial establishments will, by their nature, serve to increase the risk to public safety attendant to persons turning off the highway to go into the driveway because of the increased volume that such establishments would generate. Thus a provision, such as a left hand passing lane, which tends to ameliorate the potentially unsafe and congestive condition caused by the driveway would be a rule authorized by section five of the Act. Accordingly, the Court finds that the rule promulgated by the

defendants which authorizes them to require an applicant for a driveway permit to construct a passing lane is a rule authorized by section 5 of the Act. MCLA 247.325. It follows, therefore, that defendants could legitimately require plaintiffs to construct a left turn pass lane in accordance with the foregoing rule. Additionally, when plaintiffs refused to comply with this request, defendants were *required* not to issue the permit. See Sec. 6 of the Act, MCLA 247.326.

Plaintiffs however contend that the results of two cases, *Arrowhead* v. *Livingston County Road Commission*, 413 Mich 505 (1982), and *Harrison Township* v. *Calisi*, 121 Mich App 777 (1982), preclude the above finding.

In *Arrowhead* a county road commission, as a condition to the commission approving a proposed plot, required that a subdivision developer level a hill on a portion of county road near where the road to the subdivision entered the county road. The hill was outside the plot. The Court found that there was neither constitutional authority nor statutory authority which could empower the road commission to require a subdivision developer to make improvements on county roads as a condition for the commission's approval of the proposed plot.

Similarly, in *Harrison Township*, the Court held that neither the Township Rural Zoning Act nor the Township Planning Act empowered a township zoning commission to require a developer's site plan to construct an off site improvement, namely a by-pass lane within the street right-of-way.

However, this case does not involve the approval of a site plan or plot. Rather, it involves the authority of the defendanuts to issue permits for the construction of driveways and public rules reasonably related to the con-

struction of driveways which will maintain the public safety which otherwise would be jeopardized by the driveway's construction. The Court is of the opinion that the defendants' rule requiring the construction of a passing lane comfortably fits within the scope of the defendants' rule making authority under the Act. There being statutory authorization for the rule adopted by defendants, it follows that neither *Arrowhead* nor *Harrison Township* governs this case.

CONCLUSION

From the foregoing discussion it is apparent that plaintiffs' request for the issuance of either writ of mandamus or injunctive relief cannot be granted. The Court is authorized to issue a writ of mandamus only where plaintiffs prove they have a clear legal right to performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform such act, *Dettore* v. *Brighton Township*, 58 Mich App 652, 654-655 (1975). In the case at bar, because the Court has concluded that the defendants have acted in conformity with the Act, the Court further finds that plaintiffs have failed to show they have a clear legal right to have defendants issue the permit, and have also failed to show defendants have a clear legal duty to issue the permit. Indeed, due to plaintiffs' failure to comply with the aforementioned rule, defendants have a clear legal duty *not* to issue the permit.

Having failed to establish their entitlement to the issuance of a writ of mandamus, the defendants similarly are precluded from obtaining injunctive relief since they have not shown that any of their rights to have been violated or that defendants have acted wrongfully. See 13 Michigan Law & Practice, Injunctions, Sec. 75, p. 758.

Finally, in review of plaintiffs claims for damages the Court, in light of the above findings, concludes that plaintiffs have failed to establish any wrongful conduct on the part of the defendants which would render them liable to plaintiffs for damages. In this regard, the Court finds that the expenses and other damages claimed by plaintiffs were not incurred by plaintiffs as a result of any wrongful or misleading conduct by defendants. Indeed, the Court would note that plaintiffs proceeded with the construction of the shopping center without first having ascertained whether they would be able to obtain a driveway permit. The financial predicament that plaintiffs presently may find themselves in is one largely of their own making. Therefore there is neither a legal nor an equitable basis to award damages to plaintiffs in this case.

For the reasons stated above the Court will accordingly grant a judgment of no cause of action on the claims made by plaintiff. An order consistent with the foregoing may be presented within ten days, as per Local Court Rules. No costs are involved, a public question being involved.

/s/ RICHARD D. DUNN,
Circuit Judge

DATED at Detroit, Michigan, June 19, 1986.

(Certification Omitted)

APPENDIX I

ORDER FOR PARTIAL SUMMARY JUDGMENT AS TO BROWNSTOWN TOWNSHIP, ONLY

(State of Michigan — Circuit Court — County of Wayne)

(Dated July 26, 1985)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, v WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, Individually, Jointly and Severally, Defendants — C/A No: 83-334-841-CZ; Honorable Paul S. Teranes)

At a session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, on: JULY 26, 1985.

PRESENT: HONORABLE PAUL S. TERANES,
CIRCUIT JUDGE.

This matter having regularly come for hearing upon the motion of Brownstown Township for Summary Judgment, and the Court being fully advised in the premises,

NOW, THEREFORE, ON MOTION of John A. Gyorgy, Attorney for Brownstown Township:

IT IS HEREBY ORDERED AND ADJUDGED that partial summary judgment as to BROWNSTOWN TOWNSHIP, only, be granted for plaintiff's failure to state a claim upon which relief can be granted.

/s/ PAUL S. TERANES
CIRCUIT JUDGE

(*Certification Omitted*)

APPENDIX J

ORDER GRANTING MOTION TO DISMISS

(State of Michigan — Court of Appeals)

(Certified May 18, 1984)

(LOYER EDUCATIONAL TRUST and LARRY McDONALD, Trustee, Plaintiffs-Appellants, v WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP and HAROLD H. BONDY, Defendants-Appellees, and WAYNE COUNTY BOARD OF COMMISSIONERS, GRACE R. HAMPTON, and CLAUDE DUKES, Defendants — Docket No. 76665, L.C. No. 83303835CZ)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 16th day of May in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable: ROMAN S. GRIBBS, Presiding Judge, JOHN H. GILLIS, HAROLD HOOD, Judges.

In this cause, a motion to dismiss having been filed by defendant-appellee Board of County Road Commissioners, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court;

IT IS ORDERED that the motion to dismiss be, and the same is hereby GRANTED. Since, the February 21, 1984 order did not dispose of the plaintiffs' claim for money

damages, that order is not a final judgment within the meaning of GCR 1963, 518.2 and therefore that order is not appealable by right to this Court. GCR 1963, 806.1. This dismissal is without prejudice to the filing of a delayed application for leave to appeal. In the alternative, a claim of appeal by right will be available when the trial court enters an order disposing of all the claims presented in plaintiffs' complaint.

(Certification Omitted)

APPENDIX K

ORDER DISMISSING ORDER TO SHOW CAUSE AND PETITION FOR MANDAMUS AND INJUNCTIVE RELIEF

(State of Michigan — Circuit Court — County of Wayne)

(Dated February 21, 1984)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, Defendants — C/A No: 83-334-841-CZ; Hon. PAUL S. TERANES)

At a session of said Court held in the Courtroom in the City of Detroit, Wayne County, Michigan, on: FEBRUARY 21, 1984.

PRESENT: HONORABLE PAUL S. TERANES,
Circuit Judge

This matter having come on to be heard and after Briefs having been filed and the parties appearing in open Court for oral argument, and testimony having been taken re: the plaintiff's Motion and petition for injunctive relief or, in the alternative, a Writ of Mandamus, and the Court being fully advised in the premises,

IT IS ORDERED that plaintiff's motion and petition for preliminary injunctive relief or, in the alternative, a Writ of Mandamus, be and is hereby denied.

/s/ PAUL S. TERANES
Circuit Judge

(*Certification Omitted*)

APPENDIX L

COMPLAINT
AND PETITION FOR INJUNCTIVE RELIEF

(State of Michigan — Circuit Court — County of Wayne)

(Dated November 14, 1983)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, Defendant — No. 83-334-841CZ)

COUNT I

NOW COMES the LOYER EDUCATIONAL TRUST, LARRY McDONALD TRUSTEE, by and through attorney, M. GARY HOLLAND, and for complaint says as follows:

1. That the LOYER EDUCATIONAL TRUST is the owner of certain property located on Sibley Road, in the Township of Brownstown, Wayne County, Michigan.

2. That the defendant, BROWNSTOWN TOWNSHIP, is a Michigan Township.

3. That the WAYNE COUNTY ROAD COMMISSION, is a Michigan Municipal Body Corporate.

4. That THE WAYNE COUNTY BOARD OF COMMISSIONERS individually, are residents of Wayne County and sit on the Board of the Road Commission.

5. That the LOYER EDUCATIONAL TRUST had an architectural firm design and draft plans for a strip shop-

ping center on Sibley Road in Brownstown Township, located on the following described property:

> A parcel of land in the N.W. 1/4 of Sec. 9, T.4 S., R.10 E., Brownstown Township, Wayne County, Michigan, described as follows: Commencing at the N. 1/4 corner of Sec. 9, T.4 S., R.10 E., and proceeding thence along the N. and S. 1/4 line of said Sec. 9, S. 1°08'10" E. 60.40 ft. to the point of beginning on the S. line of Sibley Road, 120.00 feet wide, and continuing along said N. and S. 1/4 line, S. 1°08'10" E. 373.18 feet; thence S. 82°17'40" W., 320.94 feet; thence N. 1°08'10" W., 373.18 feet to a point on the S. line of Sibley Road, 120.00 feet wide; thence along said line, N. 82°17'40" E., 320.94 ft. containing 2.7314 acres

6. That L. LOYER CONSTRUCTION COMPANY was employed to do the construction work on the project for the LOYER EDUCATIONAL TRUST.

7. That permits were obtained from the Brownstown Township offices to construct the project and construction began.

8. That the shopping center was constructed in accordance with plans and drawings submitted by an architect, duly licensed and certified and in accordance with permits obtained from Brownstown Township.

9. That the shopping center has been constructed and is ostensibly completed except for connection to water and sewer lines.

The shopping center cannot open due to the refusal by THE WAYNE COUNTY ROAD COMMISSIONERS and WAYNE COUNTY ROAD COMMISSION to issue permits for the tap of certain utilities on Sibley Road and for the widening of Sibley Road adjacent to the shopping center.

10. That as a condition for allowing the shopping center to have ingress and egress on Sibley Road, THE WAYNE COUNTY ROAD COMMISSIONERS have insisted that L. LOYER CONSTRUCTION COMPANY widen Sibley Road by putting a passing lane on both sides of the highway and rerouting a county drain on the opposite side of Sibley Road.

These lane changes to Sibley Road are not pursuant to any driveway plans and are actual road improvements in the right-of-way owned by the County of Wayne.

11. That L. LOYER CONSTRUCTION COMPANY has agreed to make any driveway improvements or approaches connected to the shopping center driveway, but has refused to improve and widen Sibley Road.

That pursuant to Michigan Statutes, THE WAYNE COUNTY ROAD COMMISSION is solely responsible for the improvement of the highway system in Wayne County and cannot condition its approval of a project or a permit to open a private development by forcing a developer to improve *AND FINANCE* a county road.

12. That THE WAYNE COUNTY ROAD COMMISSIONERS have attempted to charge the costs of road improvements to an individual property owner for improvements done adjacent to property without a special assessment district being declared nor by using the taxing authority of the Wayne County Municipality to raise funds for the road improvements as specified by the County.

13. That the LOYER EDUCATIONAL TRUST has been injured in view of the fact that the shopping center has not been able to open on time, that leases have been canceled, and terminated, that danger of fire, added insur-

ance premiums have been incurred due to the vacant building located on the property and that rents and profits have been lost.

14. *INJUNCTIVE RELIEF* That unless this Court issues an injunction restraining the defendants, each and all of them, from interfering with the opening of the shopping center, plaintiff will be irreparably harmed and have no adequate remedy at law due to loss of opportunity and time, and risk of loss due to fire and vandalism. That this Court may properly restrain the defendants from interfering with the opening of the shopping center because the defendants will not be prejudiced, if the Court later finds the plaintiff liable for road improvements, however the prejudice to plaintiff is overwhelming in light of the illegal and improper action taken by the defendants by threatening plaintiff and denying it permission to open for business.

15. That the LOYER EDUCATIONAL TRUST has been injured to the extent of $750,000.00 due to lost profit, proceeds, competition for not being able to open due to the wrongful conduct of THE WAYNE COUNTY ROAD COMMISSION.

WHEREFORE, the LOYER EDUCATIONAL TRUST requests damages in the amount of $750,000.00, plus costs, interest and attorney fees so wrongfully sustained and for further continuing damages as they shall accrue.

FURTHER, the LOYER EDUCATIONAL TRUST requests punitive damages in the amount of $750,000.00 due to the wrongful conduct of THE WAYNE COUNTY ROAD COMMISSIONERS, the COMMISSION, and its Commissioners individually, plus costs, interest and attorney fees.

FURTHER, plaintiff requests that this Court issue an Order to Show Cause to compel Defendants to show cause why an Injunction should not be issued barring them from interfering with the opening of the shopping center.

COUNT II
REQUEST FOR MANDAMUS

1. Plaintiff incorporates all of the Paragraphs as alleged in Count I of the Complaint.

2. The LOYER EDUCATIONAL TRUST has done and offered to do all things necessary to construct an approach for its drive entering the shopping center.

3. That THE WAYNE COUNTY ROAD COMMISSION has wrongfully refused to allow L. LOYER CONSTRUCTION COMPANY to provide the approaches on its own property entering into the shopping center from Sibley Road.

4. That nothing remains to be done by the L. LOYER CONSTRUCTION COMPANY, except to obtain a permit to put in approaches to the driveways entering into Sibley Plaza Shopping Center.

5. That the LOYER EDUCATIONAL TRUST requests that this Court order the defendants to issue permits allowing the L. LOYER CONSTRUCTION COMPANY to proceed with construction of approaches on the south side of Sibley Road into the shopping center, and further, to allow the L. LOYER CONSTRUCTION COMPANY to connect to any utilities and sewer connections by doing all things necessary, in addition to tunnelling under Sibley Road by means of boring, or otherwise, to connect to the water and sewer system on the north side of Sibley Road. LOYER EDUCATIONAL TRUST requests that the Court order a Certificate of Occupancy to be issued

once the utilities have been tapped and inspection of the building has been completed by the Brownstown Township Building Authority and The Wayne County Road Commission.

COUNT III

Now comes plaintiff in its Count III and says as follows:

1. That the LOYER EDUCATIONAL TRUST has been discriminated against and its beneficiaries have been directly affected by discriminatory practices of THE WAYNE COUNTY ROAD COMMISSION and its individual members, in denying a permit to tap into public utilities without first making public improvements to a road in contravention of the Michigan Statutes requiring THE WAYNE COUNTY ROAD COMMISSION to be in charge of Wayne County Roads and further, setting strict rules for financing of improvements to County Roads.

2. That due to the relationship between the L. LOYER CONSTRUCTION COMPANY and the LOYER EDUCATIONAL TRUST, THE WAYNE COUNTY ROAD OF COMMISSIONERS has, in violation of both Michigan and Federal Civil Rights Acts, deprived the beneficiaries of the LOYER EDUCATIONAL TRUST of certain rights as allowed by law.

3. That the relationship between the L. LOYER CONSTRUCTION COMPANY and the LOYER EDUCATIONAL TRUST was exploited by THE WAYNE COUNTY BOARD OF COMMISSIONERS and its employees and individual members in attempting to have the L. LOYER CONSTRUCTION COMPANY make some FREE road improvements for the County of Wayne, and the taxpayers of the

County of Wayne in direct contravention and violation of the statute which creates THE WAYNE COUNTY ROAD COMMISSION and sets forth its authority.

WHEREFORE, the LOYER EDUCATIONAL TRUST and its beneficiaries request damages in the amount of $750,000.00 for violation of their Michigan Civil Rights and Federal Civil Rights, plus costs, interest and attorney fees so wrongfully sustained.

M. Gary Holland P23197
Attorney for Plaintiff
23394 Goddard Road
Taylor, Michigan 48180

November 14, 1983

APPENDIX M

EXCERPTED TRIAL COURT TRANSCRIPT

— *Plaintiff's Request for Damages for Discrimination* —

* * *

(318) THE COURT: You may proceed.

MR. HOLLAND: Thank you, Your Honor.

Your Honor, I just have a couple of points to make on my closing argument here.

I think number one, the Court has to take notice that this passing lane requirement imposed by the County was unreasonable. It was unreasonable because it also required that the Van Cleef drain was to be enclosed, and that paving had to be done in a private intersection.

The County in failing to work out any reasonable solution to the problem kept the Loyer project closed up for over four years.

While keeping Mr. Lawyer's [*sic*] project closed up for over four years, they had helped competitors of Mr. Loyer, just down the street, at virtually no cost to him allowing him to meet the passing lane requirement.

This also allowed him to open up sooner. I think that based on these facts, the Loyer claim for damages of one hundred nine thousand dollars per year for the years that he was closed up totals four hundred thirty-six thousand dollars.

Mr. Loyer, basically, the Educational Trust is asking for a like sum of four hundred thirty-six thousand dollars for damages for the discriminatory (319) action taken against him by the county. This was absolute discrimination, Your Honor.

The primary legal points that we have to make are in the Arrowhead and Calisi cases. Arrowhead and Calisi,

developed a legal pattern, if you will, that says that private individuals should not have to pay for public right-of-way improvements.

There is no system that is set up for that. And I don't think the Driveway Act would overcome the decisions of Arrowhead and Calisi. Even in the Driveway Act, Your Honor, the County can promulgate rules under this Driveway Statute; however, these rules have to be reasonable.

And these rules were not applied reasonably in Mr. Loyer's situation. And the statute, it says that nobody shall be denied reasonable access to the highway because of this Driveway Act.

I don't think that the county can promulgate rules that go beyond the scope of the act. The Driveway Act itself is designed to handle driveways. It is not designed to proportion the expenses for public right-of-way improvements, Your Honor, and I think that, therefore, the Driveway Act would also be within the parameter of Arrowhead.

In fact, in Arrowhead, it is in a Supreme (320) Court, in a footnote, discussed the Driveway Act. Therefore, I think that the Loyer Educational Trust is requesting relief by way of damages. Also we request that the permits be issued which would allow the Loyer Educational Trust to complete and open up the Sibley Plaza Shopping Center.

Thank you, Your Honor.

MS. NIFOROS: Perhaps I misheard, Your Honor, I thought that in addition to the Trust asking for damages that Mr. Holland also asked for damages on Mr. Loyer's behalf. But the only named Plaintiff in the matter is Loyer Trust and trustee who has never appeared here.

If I misheard then that is fine.

MR. HOLLAND: I am only asking for damages for the Loyer Educational Trust, Your Honor.

MS. NIFOROS: Okay.

* * *

APPENDIX N

RELEVANT STATUTORY PROVISIONS

MCLA § 247.321 *ET SEQ.*

DRIVEWAYS, BANNERS, EVENTS AND PARADES

Act 200, 1969, p 382; imd eff August 6.

[Title as amended by Pub Acts 1981, No. 177, imd eff December 14, which contained a section 2 providing: "This amendatory act shall not take effect unless Senate Bill No. 462 of the 81st Legislature [which became Act No. 178] is enacted into law."]

AN ACT to regulate driveways, banners[, events,] and parades upon and over highways[; to provide for the promulgation of rules; to prescribe requirements for the issuance of permits; and to provide for the issuance of those permits].

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

§ 9.140(21) Definitions.]

Sec. 1. As used in this act:

(a) "Driveway" means a driveway, lane, or road or any other way providing vehicular access to or from the highway from or to property adjoining the highway but does not mean a city or village street or other highway covered by the provisions of Act No. 288 of the Public Acts of 1967, being sections 560.101 to 560.293 of the Compiled Laws of 1948.

(b) "Highway" means a state trunk line highway or a county road including the entire right of way.

(c) "Highway authority" means the department of state highways in the case of state trunk line highways, and the board of county road commissioners in the case of county roads. (MCL § 247.321.)

Statutory references. Act No. 288 of 1967, above referred to, is § 26.430(101) et seq., infra.

§ 9.140(22) Necessity for permit; other regulations.]

Sec. 2. No driveway, banner or parade is lawful except pursuant to a permit issued in accordance with this act unless otherwise provided. Nothing in this act shall be construed to prevent the application of the provisions of any other statute of this state or any local ordinance which is more restrictive than this act nor to preclude any city or village from requiring city or village permits with respect to any street or highway within its corporate limits. No permit shall be issued pursuant to this act unless there is compliance with other provisions of law or ordinances. (MCL § 247.322.)

§ 9.140(23) Permits; requests; traffic handling arrangements; objects overhanging traveled ways; exception.]

Sec. 3. [A permit] to temporarily close a highway, or a portion of the highway, for a parade, celebration, festival, or similar activity, and [a permit] for banners, decorations, or similar objects to overhang the traveled way of a highway, may be issued by the highway authority only if requested by an authorized official designated by resolution of the governing body of a city, incorporated village, or township. Requests for tempo-

rary closing of highways shall indicate the time and date the highway is to be closed to traffic, the date and time the highway is to be reopened to traffic, and ♦ other information as the highway authority may require. ♦ [A] permit shall [not] be issued for the partial or complete closing of a highway unless the highway authority is satisfied that adequate arrangements have been made for the handling of highway traffic during such closure. Permits for banners, decorations, or similar objects over the traveled way of a highway shall require that they be securely fastened and be at least 18 feet above the surface of the traveled way. [This section does not apply to a racing event for which a permit has been issued under the city motor vehicle racing act of 1981.] (MCL § 247.323.)

History. As amended by Pub Acts 1981, No. 177, imd eff December 14, which contained a section 2 providing: "This amendatory act shall not take effect unless Senate Bill No. 462 of the 81st Legislature [which became Act No. 178 of 1981] is enacted into law."

§ 9.140(24) Rules and standards.]

Sec. 4. Permits for driveways shall be granted in conformity with rules promulgated by the highway authority which shall be consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest. Rules shall prescribe reasonable standards for the design and the location of driveways and may require that driveways shall be hard-surfaced. The provisions of this section shall not be deemed to deny reasonable access to a nonlimited access highway. (MCL § 247.324.)

§ 9.140(25) Rules; adoption by reference; procedure.]

Sec. 5. The department of state highways shall make rules necessary for the administration of this act in

accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and being subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948. The boards of county road commissioners may adopt by reference the rules, in whole or in part, of the department of state highways or may adopt its own rules after a public hearing of which notice has been given by publication at least twice in a newspaper circulated in the county not more than 30 days nor less than 7 days prior to the hearing. (MCL § 247.325.)

Statutory references. Act No. 88 of 1943, above referred to, is § 3.560(7) et seq., since repealed; Act No. 197 is § 3.560(21.1) et seq., which was repealed by Pub Acts 1969, No. 306, eff July 1, 1970.

§ 9.140(26) Requirements for issuance of permit; revocation; exception.]

Sec. 6. ♦ [A] permit shall [not] be issued unless all the requirements of this act, and of rules made ♦ [pursuant to] section 5, are met. A permit may be revoked by the highway authority issuing it if at any time the permitted object, use, or activity fails to meet the requirements of this act or rules made in accordance with section 5. [This section does not apply to a permit issued by a city under the city motor vehicle racing act of 1981.] (MCL § 247.326.)

History. As amended by Pub Acts 1981, No. 177, imd eff December 14, which contained a section 2 providing: "This amendatory act shall not take effect unless Senate Bill No. 462 of the 81st Legislature [which became Act No. 178 of 1981] is enacted into law."

§ 9.140(27) Preexisting driveways; land served changed or expanded, effect; rule violations; corrections; failure to correct.]

Sec. 7. ♦ This act shall not apply to driveways in existence on ♦ [August 6, 1969, except that if the use of

the land served by the driveway is changed or expanded, and the change or expansion causes the existing driveway to be a safety hazard, the driveway shall be considered a new driveway subject to] this act. ♦ [A] driveway which is constructed or reconstructed after the effective date of the rules issued pursuant to this act and which is in violation of the rules shall be corrected by the owner within a period of time, not less than 30 days, specified in the notice of violation sent by certified mail to the owner. If not ♦ corrected within the period required by the notice, the highway authority or its agents may perform the necessary correction and the owner shall reimburse the highway authority for the reasonable cost of correction. [MCL § 247.327.]

History. As amended by Pub Acts 1978, No. 83, imd eff March 29.

§ 9.140(28) Preservation of authority to acquire property.]

Sec. 8. Nothing in this act shall limit the right of the highway authority in the exercise of its authority to acquire property for highway purposes or to widen, relocate, reconstruct, improve or maintain any highways. [MCL § 247.328.]

§ 9.140(29) Authorization of municipality to issue permits.]

Sec. 9.

[(1) Except as provided in subsection (2),] the state ♦ [transportation] commission by resolution may authorize any city or village to issue on behalf of the state the permits required by this act with respect to state trunk line highways within the corporate limits of the city or village provided the permits are issued ♦ [pur-

suant to] this act and rules promulgated ♦ [under] this act, subject to ♦ conditions as the commission may prescribe and subject to acceptance of [that] authority by the governing body of the city or village.

Permit under city motor vehicle racing act.]

[(2) A permit issued by a city under the city motor vehicle racing act of 1981 shall be considered to be a permit issued for all purposes under this act regarding any highway located within the limits of the city.] (MCL § 247.329.)

History. As amended by Pub Acts 1981, No. 177, imd eff December 14, which contained a section 2 providing: "This amendatory act shall not take effect unless Senate Bill No. 462 of the 81st Legislature [which became Act No. 178 of 1981] is enacted into law."

28 USC § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch 646, § 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P.L. 100-352, § 3, 102 Stat. 662.)

42 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979, Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

No. 88-2125

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

LOYER EDUCATIONAL TRUST,
LARRY MCDONALD, TRUSTEE,

Petitioner,

v.

WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY, Individually, Jointly and Severally, now COUNTY OF WAYNE, Successor in Interest,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

– AND APPENDICES –

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COUNTER-QUESTIONS PRESENTED

I.

MAY PETITIONER SEEK REVIEW OF ALLEGED CLAIMS UNDER 42 U.S.C. § 1983 WHEN THERE HAS BEEN NO CITATION TO THAT STATUTE IN THE CASE BEFORE THE PETITION FOR CERTIORARI?

II.

WHERE COUNTY ROAD COMMISSIONS ARE AUTHORIZED TO PROMULGATE RULES REQUIRING COMMERCIAL DEVELOPERS TO ADHERE TO DRIVEWAY CONSTRUCTION AND SAFETY STANDARDS, AND THE RULES ARE WITHIN THE AUTHORITY CONFERRED BY THE LEGISLATURE AND SATISFY THE PURPOSE OF THE EMPOWERING STATUTES, MAY THE RULES BE CHALLENGED AS USURPING LEGISLATIVE AUTHORITY?

III.

WHEN DEVELOPERS ARE REQUIRED TO MEET TRAFFIC SAFETY STANDARDS WHICH ARE TRIGGERED BY THE VOLUME OF CONSUMER TRAFFIC THEY WILL GENERATE, UNDER RULES APPLIED WITHOUT EXCEPTION, CAN PETITIONER BE FOUND TO HAVE SUFFERED DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS?

IV.

WHEN REGULATION IS REASONABLE AND CONSISTENT WITH ASSURING PUBLIC SAFETY, CAN IT BE A TAKING PROHIBITED BY THE CONSTITUTION?

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No. 88-2125

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Respondents Wayne County Road Commission and the Board of Wayne County Road Commissioners, and individual Commissioners, now County of Wayne, Successor in Interest, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Supreme Court of the State of Michigan.

RESPONDENTS' STATEMENT OF THE CASE

The original Respondents constituted the Wayne County Road Commission. In 1982, Wayne County adopted its home rule charter, and in 1984 the County electorate eliminated the Wayne County Road Commission as a separate entity and incorporated the road authority within the Department of Public Services.

Wayne County is the legal successor to the Wayne County Road Commission as stipulated at trial.

Sometime prior to April, 1981, Petitioner began construction for a commercial shopping strip on Sibley Road in Brownstown Township in southwest Wayne County, half a mile east of Telegraph Road, a state trunkline. Sibley Road is a two-lane county road, one lane eastbound, one westbound, with a posted speed limit of 45 mph. The Loyer property consists of approximately 3½ acres, with a 350-foot frontage on Sibley, on the south side of the road. Surrounding property was essentially undeveloped.

All construction by Petitioner was without a permit, and application was made only after the building and site were substantially completed. Petitioner applied for a driveway permit on April 1, 1981, for approval of a driveway upon the Sibley Road right-of-way. The Wayne County Road Commission did not approve Petitioner's submitted plans, requesting additional data on some points, and notifying Petitioner that it would be required that Petitioner construct a passing lane opposite the driveway to permit motorists to safely go around Petitioner's customers making left turns into the shopping center.

Petitioner relocated the driveway from the Sibley Road frontage to a private road to the west of the construction property. The relocated driveway was also constructed without a permit and without meeting construction or safety standards, and was an attempt to circumvent the necessity for a permit. A second permit application was submitted on October 14, 1981, only after Respondent contacted Loyer to do so.

The Road Commission notified Loyer on November 19, 1981, that, among other things, the private road had

been unlawfully constructed without the requisite permit, and whether or not the shopping center was continued, the road must be reconstructed to meet standards for a street or drive approach to a primary road. Certain information requested by the Road Commission earlier in April had still not been provided. Probably the essential item was the continued requirement of a passing lane on the north side of Sibley, to safely accommodate left-turning traffic into the private road if it was to serve as driveway into the development. The location of the second driveway to the west of the first created additional problems and required additional work of the developer to meet safety standards. Petitioner did not comply with any requirements. Respondents did not issue a permit.

The commercial shopping strip Petitioner had proposed to develop was a 24,000 square foot facility containing a number of shops. Prior use of the land by the same owner was for a garden center using a much smaller building and generating a smaller volume of consumer traffic.

On November 13, 1983, nearly two years after the last plan submitted to Respondents, Loyer Educational Trust filed suit for injunctive relief to require issuance of a permit and asked $750,000 for lost profits, another $750,000 in punitive damages for wrongful conduct, and another $750,000 for violation of unspecified federal and state civil rights.

Testimony on Petitioner's Show Cause for injunctive relief was taken before Wayne County Circuit Judge Paul Teranes on January 4, 1984; briefs were submitted and oral arguments made on February 3, 1984. Petitioner stipulated to Respondents' facts, including that the crux of the dispute was the passing lane on the north side of Sibley. Petitioner further stipulated that

the passing lane was required by the Wayne County Road Commission rules and standards and that the passing lane was a safety feature of the rules. (Hearing Transcript, January 4, 1984, at 5-6.) The Road Commission adopted the rules pursuant to the Driveways, Banners, Events and Parades Act, M.C.L.A. 247.321 *et seq.*, M.S.A. 9.140(21) *et seq.* Petitioner relied exclusively on *Arrowhead Development Co.* v. *Livingston County Road Comm'n.*, 413 Mich. 505, 322 N.W.2d 702 (1982), a case construing the Subdivision Control Act, M.C.L.A. 560.183 *et seq.*, M.S.A. 26.430(183) *et seq.* The pre-trial judge issued an oral decision the same day refusing injunctive relief. He found no irrevocable harm, and because of distinctions he saw between *Arrowhead* and this case, stated he could not find a probability of success on the merits.

At the oral argument before Judge Teranes, Respondents asked Petitioner to mitigate the alleged damages by posting a performance bond as did the *Arrowhead* developer. Petitioner refused. The bond would have allowed Petitioner to open his development and still challenge Respondents' authority. The bond could have been posted as early as 1981 fixing the disputed damages at $40,000.00 for the passing lane and other work on the north side while the parties continued to argue legal matters. The Road Commission also reiterated an earlier offer to defer the passing lane construction for a year after the shopping center opened and it was again refused.

On February 21, 1984, Petitioner filed a Claim of Appeal from Judge Teranes' decision without seeking leave to appeal from an interlocutory order. The Court of Appeals dismissed the appeal on the petition of the Road Commission on May 16, 1984, but without preju-

dice to the filing of a delayed application for leave. Petitioner did not seek leave to appeal.

The case proceeded to a bench trial before Judge Richard Dunn in May, 1986. Petitioner presented testimony of Mr. Loyer, who had served as contractor for Petitioner: on construction costs, on communications between the parties and for the claim that Petitioner had been unfairly treated, compared to his "competitor." Petitioner also presented hypothetical and speculative damages testimony of a real estate broker who cited market value and rental incomes of four neighboring shopping strip developments. Respondents' witnesses were a traffic transportation engineer and a design and mining engineer. They testified to construction costs, the permit application process, the driveway construction rules and regulations, the necessity of a passing lane, the traffic volume generated by commercial developments, including projected left turns at peak hours, and the failure of Petitioner to mitigate damages.

The trial court received as exhibits all correspondence between the parties including blueprints and permit applications and responses, four real estate listings by Petitioner's witness, construction and performance bond cost estimates prepared by each side for the trial, Sibley Road traffic volume counts conducted by Respondents in 1981 and 1983, and a copy of a permit-file for the competitor project. This was the Koza project which testimony showed had selected a site north of Sibley which obviated any drain work, and adjacent to a state highway intersection (I-75) to which the State determined in 1983 to add lanes and signals. The overlap of the State project undertaken with general road funds meant Koza could not be required to pay for a passing lane within the State's work. Koza's

performance bond was canceled. The court further took judicial notice of another driveway permit dispute in the case of *Bzovi* v. *Board of Wayne County Road Commission*, Wayne County Circuit Court Case No. 80-028726-CZ (Judge Brennan, March 6, 1981) in which another Brownstown Township developer was ordered to put in a passing lane. The *Bzovi* development was under 9,000 square feet, and its passing lane performance bond was for $20,000.00.

Before the trial in *Loyer*, the parties had stipulated that the Road Commission had adopted *Rules, Standards and Procedures for Driveways Within Wayne County Road Commission Right-of-Way* in 1970, with proper publication notices and public hearings as required by the Driveway Act. (*See* Respondents' Appendix A for the Rules.) (The *Bzovi* court order is Respondents' Appendix B.)

After four days of trial, the case was taken under advisement. A seven-page opinion was issued on June 19, 1986, with findings of fact and conclusions of law. Judgment for Respondents was entered July 1, 1986.

The trial court found that the rules and standards adopted by the Respondents which required a passing lane were authorized by the Driveway Act and that the Act required Respondents not to issue a permit where a developer refused to comply. The court held *Arrowhead* did not govern this case and that the Driveway Act and the Subdivision Control Act were different creatures. The court further found no wrongful conduct by Respondents and therefore no legal or equitable basis on which to award damages.

Petitioner appealed to the Michigan Court of Appeals, which affirmed the trial court. Petitioner then applied for leave to the Michigan Supreme Court, which denied

leave to appeal and then later denied a petition for reconsideration.

REASONS FOR DENYING THE WRIT

I.

ABSENT A TIMELY AND ADEQUATE CHALLENGE TO THE VALIDITY OF A STATUTE OF A STATE AS REPUGNANT TO THE U.S. CONSTITUTION OR FEDERAL LAWS, JURISDICTION IS NOT SHOWN, AND THERE ARE NO GROUNDS ON WHICH TO GRANT CERTIORARI.

Petitioner stated it invokes jurisdiction pursuant to 28 U.S.C. § 1257 "because a local administrative rule was challenged as violating the U.S. Constitution and the rule was upheld by the Michigan Courts."

Throughout the state court proceedings, however, Petitioner had urged its own particular construction of a Michigan statute to fit within the reasoning and holding of a Michigan Supreme Court case. Petitioner urged the Driveway Act, M.C.L.A. 247.321 *et seq.*, M.S.A. 9.140(21) *et seq.*, be construed in accordance with the Court's reading of the Subdivision Control Act, M.C.L.A. 560.183 *et seq.*, M.S.A. 26.430(183) *et seq.*, in *Arrowhead Development Cop.* v. *Livingston County Road Comm'n.*, 413 Mich. 505, 322 N.W.2d 702.

Petitioner had contended that the Driveway Act did not authorize the Wayne County Road Commission to promulgate rules requiring as a precondition for issuance of a driveway construction permit, under certain circumstances, that commercial developers construct a passing lane around left-turning traffic into the driveways for their commercial development. In effect, Petitioner only challenged that the local government's

rules were repugnant to the state statute and to state decisional law.

It is true Petitioner's original Complaint alleged in Count III, ¶ 2, that Respondents had "in violation of both Michigan and Federal Civil Rights Act, deprived [Petitioner] of certain rights as allowed by law." Vague generic rights are again alluded to in Petitioner's prayer for relief. (Petitioner's Appendix L.)

There was subsequently a bench trial before then-Chief Judge Dunn in May, 1986. Petitioner submitted as its trial brief the same legal brief submitted to the pre-trial judge who heard and denied Petitioner injunctive relief in February, 1983. (Petitioner's trial brief is here submitted as Respondents' Appendix C.) Petitioner's trial brief again challenged the Road Commission's Rules as unauthorized by state law. There was again no mention of 42 U.S.C. § 1983, and, no allegation of specific federal constitutional violations. Indeed, there were not even unspecific federal allegations in this pleading.

Petitioner's opening statement on May 13, 1986 (Respondents' Appendix D) also did not state any federal claims, specific or unspecific.

Petitioner's closing argument on May 20, 1986 (reproduced in its entirety as Petitioner's Appendix M) also did not state any federal claims. Again the argument was entirely state law. Petitioner argued its competitor was more favorably treated, and that Loyer was therefore discriminated against, without mention of state or federal grounds.

The trial court issued an opinion on June 19, 1986. (Petitioner's Appendix H.) The trial court's decision was necessarily on state law grounds finding Respondents' rules establishing traffic safety standards were man-

dated by the Driveway Act and that the Rules were reasonable and properly applied. The trial court found no grounds for legal or equitable relief, concluding "[t]he financial predicament that plaintiffs presently may find themselves in is one largely of their own making." (Petitioner's Appendix at H-7.)

Subsequently, Petitioner filed an appeal as of right to the Michigan Court of Appeals on May 11, 1989. Petitioner's appellate brief Table of Authorities does not cite 42 U.S.C. § 1983, nor any federal case law. (Respondents' Appendix E.) For the first time, Petitioner cited the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner spent less than four pages of a nineteen-page appellate brief on its newly raised and articulated federal claims. The Michigan Court of Appeals affirmed the trial court's finding that the rules and procedures promulgated were well within the authority conferred by the driveway statute and satisfied the purpose of the Act, and that Respondents' requirements of Petitioner were consistent with the rules. The Court of Appeals also found no taking and no denial of equal protection, apparently under either state or federal constitutions. (*See* Petitioner's Appendix at F-7, -8.)

In its subsequent Application for Leave to Appeal to the Michigan Supreme Court dated June 7, 1988, Petitioner expanded its federal authorities to include two federal cases decided in 1987 and slightly lengthened its federal claims arguments. (Respondents' Appendix F; *see also* Petitioner's Appendix E.) Leave was denied December 29, 1988, and Reconsideration was denied March 29, 1989. *See* Petitioner's Appendices D and B, respectively. It is clear Petitioner was content to go to trial arguing state law, and it was only after it lost that it began to attempt to develop a federal claim in order to get a second bite.

Respondents contend the Rules of the Road Commission are not a statute within the meaning of 28 U.S.C. § 1257. Respondents contend further that Petitioner failed to timely and adequately raise and preserve any specific federal claims. *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 484 n. 16, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). *See generally* F. Weiner, *Wanna Make a Federal Case Out of It?*, 48 A.B.A.J. 59 (1962). These are threshold elements which are Petitioner's burden to meet and demonstrate. *Street* v. *New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

II.

IF A STATE COURT'S JUDGMENT RESTS ON A STATE GROUND, THE UNITED STATES SUPREME COURT HAS NO JURISDICTION TO REVIEW THE CASE, AND CERTIORARI CANNOT BE GRANTED.

Even if this Court were to find Petitioner's federal claims were timely and adequately raised, and that Petitioner had otherwise met jurisdictional requirements, jurisdiction is still not established if the state court's decision is based, in the alternative or otherwise, on an adequate and independent nonfederal ground. *See, e.g., Williams* v. *Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945). *See also* Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977).

Where the state court decision is on mixed state and federal grounds, and the state court may even be arguably wrong on the federal question, there is no Supreme Court jurisdiction to review the case. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945). The Court may inquire if the decision rests on an independent and adequate state ground, but reference in the

opinion to the federal question must be more than broad generalization if the independence or adequacy of the state ground may be overcome. *Herb* v. *Pitcairn, supra*; *Williams* v. *Kaiser, supra* at 477-78.

Jurisdiction is not acquired by speculation as to other grounds the state court might have chosen, or to find "somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature." *Whitney* v. *California*, 274 U.S. 357, 362, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); *Dewey* v. *Des Moines*, 173 U.S. 193, 199, 19 S.Ct. 379, 43 L.Ed. 665 (1899).

MAY PETITIONER SEEK REVIEW OF ALLEGED CLAIMS UNDER 42 U.S.C. § 1983 WHEN THERE HAS BEEN NO CITATION TO THAT STATUTE IN THE CASE BEFORE THE PETITION FOR CERTIORARI?

Petitioner argues a state *must* entertain a claim under 42 U.S.C. § 1983.

Respondents cannot find mention of or citation to 42 U.S.C. § 1983 anywhere in the trial transcripts or in any of Petitioner's state court pleadings at any level. To imply such a claim in retrospect at this stage would encourage unending piecemeal litigation and appeals.

Respondents urge the petition be denied.

WHERE COUNTY ROAD COMMISSIONS ARE AUTHORIZED TO PROMULGATE RULES REQUIRING COMMERCIAL DEVELOPERS TO ADHERE TO DRIVEWAY CONSTRUCTION AND SAFETY STANDARDS, AND THE RULES ARE WITHIN THE AUTHORITY CONFERRED BY THE LEGISLATURE AND SATISFY THE PURPOSE OF THE EMPOWERING STATUTES, MAY THE RULES BE CHALLENGED AS USURPING LEGISLATIVE AUTHORITY?

Petitioner argues the conduct of Respondents conflicts with "pronouncements of this Court's decisions."

(Petition at 16.) In order to make that argument, Petitioner misconstrues and mischaracterizes the nature of Respondents' authority and conduct. Petitioner argues "[a]dministrative agencies merely implement what the legislature creates." [Petition at 17.] Petitioner cites *National Cable Television Assoc.* v. *United States and Federal Communications Comm'n.*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) without much elaboration.

First, *National Cable* was not raised by Petitioner in state court proceedings.

Second, Respondents' conduct is fully authorized by state law. The State Constitution states "[t]he legislature may provide the powers and duties of counties in relation to highways." Mich. Const. 1963, art. 7, § 16. There is legislative provision, for example, for specific delegation of police powers to local authorities for control of traffic in the Michigan Vehicle Code. M.C.L.A. 257.606, M.S.A. 9.2306. The constitutional and legislative scheme to delegate local traffic safety to local government is clear.

The Driveway Act was passed in 1969. It was for the purpose of regulating driveways, banners, events and parades upon and over highways, and to provide for promulgation of rules, and to prescribe requirements for the issuance of permits.

The state trial court (Petitioner's Appendix H) and the Michigan Court of Appeals (Petitioner's Appendix F) thoroughly analyzed the Driveway Act and found authorization for Respondents' rules, and approval of the regulatory design. Respondents' rules and standards are reprinted as Respondents' Appendix A.

The Rules (especially Figures 1 through 10) delineate a spectrum of standards depending on the circumstances of a landowner (from single residential to com-

plex intersection corner multiple driveways), the nature of proposed use of property, and the magnitude of traffic problems generated by the specific proposed driveway. There was considerable testimony at trial that traffic counts on Sibley Road, in combination with the left turns projected for peak hours for an operating shopping development of the size and nature proposed by Petitioner, more than warranted the requirement of a passing lane for traffic safety.

Petitioner was required to pay for the passing lane on the north side of Sibley because Petitioner created the traffic hazard. Petitioner expected profits from a commercial venture that depended for its success on consumer traffic. Petitioner early agreed to provide a deceleration lane on the south side for right turns into the development but exaggerated the north side passing lane requirement out of all proportion. Petitioner was not required to widen all of Sibley. The passing lane (Figure 8, Respondents' Appendix A, page A-24) was to be 200 feet long with a 150-foot tapering triangular shape ("tapers") in each direction. No other development could expect to enjoy the passing lane; the nearest neighbor was a single-family dwelling slightly northwest of the relocated driveway. Passing motorists should not have to pay for Petitioner's commercial success with injuries and rear-end collisions, and being forced into a drain culvert. Nor should public monies be diverted from public projects to subsidize a private venture. The north side improvements to the Emit Street apron were necessitated by Petitioner's relocation of the drive. The drain enclosure requirement was necessitated by Petitioner's site selection. These facts are amply supported by the record.

Third, Respondents' rules are fully consistent with federal law. Respondents' rules served the governmental

purposes of the statute and are therefore a valid regulation. Petitioner's development created the problem and would derive sole benefit from the resolution of the problem. The condition on the permit of a passing lane for large volume, traffic-generating, developments serves the same purpose as prohibiting the development altogether and is therefore a valid regulation of land use. *Nollan* v. *California Coastal Commission*, 483 U.S. __, 107 S.Ct. at 3148, 97 L.Ed.2d 677 (1987). The state court in *Loyer* acted in harmony with *Nollan*.

National Cable involved licensing fees for community antenna television systems. The court held a fee is permissible when there is a benefit bestowed on the applicant that is not shared by other members of society. 415 U.S. at 341-42, 94 S.Ct. at 1149, 39 L.Ed.2d 370. Petitioner cannot show that Respondents or the state court acted contrary to *National Cable* or other federal decisions.

WHEN DEVELOPERS ARE REQUIRED TO MEET TRAFFIC SAFETY STANDARDS WHICH ARE TRIGGERED BY THE VOLUME OF CONSUMER TRAFFIC THEY WILL GENERATE, UNDER RULES APPLIED WITHOUT EXCEPTION, CAN PETITIONER BE FOUND TO HAVE SUFFERED DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS?

Petitioner argued in state court that the right-of-way on the north side of Sibley was off-site to Petitioner's land, so the case might better fall within *Arrowhead*. Petitioner now argues it is off-site so as to make the required safety work unreasonable. In reality, the road right-of-way extends from private property line to private property line, and includes roadways, shoulders and drainage ditches. The road right-of-way adjoins and touches Petitioner's property. A driveway, by its nature,

becomes a part of the road for the motoring public and depends on the road right-of-way to fully and safely complete its purpose of providing entry and exit. (*See* Respondents' Appendix A, Figure 8, page A-24.) The Driveway Act describes itself as *"regulating driveways,* banners, events and parades *upon* and over *highways"* (emphasis added).

Petitioner has complained of unfair treatment, but in actuality, Petitioner has asked for preferential treatment. Respondents' engineers testified no exception was ever made under the Rules since their adoption. Petitioner asked to be exempted from the safety measures required of others. It sought to circumvent the permit application process. It chose a poor site and committed to the site by expending monies before ascertaining permit requirements. It demands public funds be used to provide safe passage to motorists around the consumer traffic its commercial development will generate.

Petitioner was given numerous meetings and hearings. Political intervention was made on its behalf by a local official. Petitioner consistently from 1981 refused to post $40,000.00 construction bond or issue a letter of credit (common construction contractor procedures even when there is no dispute), then complained its "competitor" Koza was allowed to open before it, in 1983. The Koza developer followed the procedure. The Arrowhead developer also did. Petitioner would not.

Equal protection of the laws is not violated when all persons similarly situated are treated similarly.

Respondents' rules, standards and procedures were adopted and published over a decade before Petitioner began to complain there were no standards. Respondents' rules may displease Petitioner but are not un-

reasonable. Respondents' rules are rationally related to a legitimate state interest. *E.g., Pennell* v. *City of San Jose*, 485 U.S. __, 108 S.Ct. 849, 859, 99 L.Ed.2d 1 (1988). Protection of public welfare is a legitimate and rational goal of traffic safety regulation. *Id.*, 485 U.S. __, 108 S.Ct. at 858-59, 99 L.Ed.2d 1. *See also Cryderman* v. *City of Birmingham*, 171 Mich. App. 15, 429 N.W.2d 625 (1988). In addition, the hardship to the owner should not be self-created. *Id.* at 21, 429 N.W.2d 625.

WHEN REGULATION IS REASONABLE AND CONSISTENT WITH ASSURING PUBLIC SAFETY, CAN IT BE A TAKING PROHIBITED BY THE CONSTITUTION?

Petitioner argues there was a taking of its property. Petitioner doesn't reason, but rather concludes there was a taking, *citing First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) and *Nollan* v. *California Coastal Commission, supra.* Petitioner insists there was a regulatory taking which deprived Loyer of *all* use of the property.

Petitioner claims this issue was "raised and briefed throughout these proceedings." Respondents can find no mention and no briefing of Petitioner's Question IV in state court until appeal to the Michigan Court of Appeals. (*See* Respondents' Appendices C-E.)

Nollan was discussed earlier in this brief.

First Evangelical is a complex case. It involved an ordinance which was found to have deprived the landowner of all beneficial use. There was testimony in *Loyer* that Petitioner continued to use the southern part of the property for the L. Loyer Construction Company headquarters, and was using the shopping strip shell for storage for his construction business. It had also formerly been used for a nursery business.

The Driveway Act and Respondents' standards required safety preconditions be met for issuance of a permit. The Rules allowed issuance of a permit on a performance bond. Petitioner refused the deferred construction plan offered by Respondents.

Nothing prevented Petitioner from using the property for a different venture which would not generate as much traffic. Certainly nothing did prevent Petitioner from using the property to store construction materials and equipment. Therefore, Petitioner was not denied all use.

Under both state and federal law, land use regulation which precludes the most beneficial use may be justified where restriction is reasonably necessary to the effectuation of a substantial public purpose. *Cryderman* v. *Birmingham, supra,* 171 Mich. App. at 27, 429 N.W.2d 625, *citing Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104, 129, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), reh. den. 439 U.S. 883 (1978).

Assuming Petitioner's land use was regulated at all, it is well settled that property use may be regulated. *E.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Certainly if the regulation goes "too far," it will be recognized as a taking. *Id.* at 415, 43 S.Ct. at 160, 67 L.Ed. 322. But a landowner has an obligation in the use of his land not to injure the community. *Keystone Bituminous Coal Assn.* v. *DeBenedictis,* 480 U.S. ___, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 472 (1987). *See also Mugler* v. *Kansas,* 123 U.S. 623, 665, 8 S.Ct. 273, 299, 31 L.Ed. 205 (1887). In fact, the Supreme Court in *Keystone* determined that health and safety regulation cannot constitute a taking. 480 U.S. at ___, n. 22, 107 S.Ct. at 124, n. 22, 94 L.Ed.2d 472.

Finally, the Supreme Court has declined to review a taking claim as long as the property owner had an

opportunity to obtain relief from the regulating authority that would permit the development of the property to go forward. *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. ___, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson Planning Comm'n.* v. *Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: July 27, 1989.

APPENDICES TO BRIEF IN OPPOSITION

• • •

RESPONDENTS' APPENDIX A

RULES, STANDARDS AND PROCEDURES FOR DRIVEWAYS WITHIN WAYNE COUNTY ROAD COMMISSION RIGHT-OF-WAY

BOARD OF WAYNE COUNTY ROAD COMMISSIONERS
415 CLIFFORD DETROIT, MICH 48226

ADOPTED February 17, 1970
Revised as of April 1, 1981

The efficiency and safety of a road or street depends to a large extent upon the amount and character of roadside interference with the movement of through traffic. Vehicles entering, leaving or crossing the roadway from residences, businesses, shopping centers, restaurants and other developments cause some of this interference. To the extent that this friction can be reduced, the highway user will benefit.

Accordingly, regulation and control of driveways are necessary to provide efficient and safe operation and to utilize the full potential of the highway investment. Highway-fronting land owners have certain rights of access consistent with their needs, and road users have certain rights to freedom of movement and safety. The Wayne County Road Commission has the responsibility of regulating and controlling the location, design and operation of access to roads and streets under its jurisdiction.

PURPOSE

These Rules, Standards and Procedures set forth the policy guidelines of the Wayne County Road Commis-

sion concerning driveways and sets forth the basic requirements for the design and construction of these driveways.

The objectives of these Rules, Standards and Procedures are:

1. To provide maximum protection and safety for the public through the orderly control of traffic entering and leaving roads or streets at driveways.
2. To provide a uniform policy throughout the County in the design and construction of driveways.

DRIVEWAY PERMITS

GENERAL

Any person, organization or governmental unit desiring to construct, reconstruct, relocate or resurface a driveway within Wayne County Road Commission right-of-way shall make application and secure a permit before beginning construction. Platted street approaches and crossovers in highway medians shall be governed by the Board's published Subdivision Rules and Regulations. The acceptable applicants for driveway permits are property owners or lessees, or a contractor employed by the property owner. However, the owner or his agent and the contractor may be required to sign the permit.

A revision in the manner of use of property abutting a highway (viz; a change from residential to commercial use or in the type of commercial operation) may require alterations in the number, design and/or loca-

tion of driveways. The owner or such property shall obtain a permit for and accomplish such driveway revisions as are determined to be necessary by the Wayne County Road Commission.

The applicant shall furnish all materials and bear all costs of necessary construction, including tapers, widenings, islands, pavement marking, signing, etc., within Wayne County Road Commission right-of-way. Further, it shall be the responsibility of the property owner or lessee to maintain all driveways connecting the property to the roadway, as well as those appurtenances set forth in the permit as related requirements. Maintenance of road widenings which become part of the main roadway will not be the responsibility of the permit holder.

The Wayne County Road Commission reserves the right of inspection by its authorized representatives of any driveway construction within the highway right-of-way. The permit applicant shall reimburse the Wayne County Road Commission for the services required for the review and approval of plans, and for any on-the-job inspectors which are required. In the event of failure to comply with the terms and conditions of the permit or if the property owner fails to obtain a permit, the Wayne County Road Commission shall have the right to take appropriate action as allowed in Act 200 of the Public Acts of 1969. All costs incurred in corrective action to comply with design standards, defective workmanship and/or materials shall be borne by the applicant.

Applications should be submitted as early as possible. In the case of new commercial, industrial and apartment developments, the Wayne County Road Commission Engineer of Highway Design should be contacted in the initial site planning stages so that a

preliminary access plan satisfactory to all parties can be established early in the development process. This access plan will include satisfactory storm drainage outlets, proper driveway locations and will consider the relationship between parking and storage facilities and other development in the vicinity, either on private property or on public right-of-way. COUNTY ROAD DRAINAGE FACILITIES MAY NOT BE USED TO DRAIN STORM WATER FROM PRIVATE PROPERTY.

MAKING APPLICATION

Prior to applying for a permit for industrial, commercial or apartment driveways, the site development plans for the complete project must have the approval of the Engineer of Highway Design.

All applications for industrial, commercial or apartment driveways shall be submitted to the Engineer of Streets, 415 Clifford, Detroit, Michigan 48226, phone 224-7600 (or as directed by the letter of plan approval). The permit is fully executed and in force after the plans are approved and the permit signed by the owner or his agent, the contractor and the authorized representative of the Board.

Applications for residential driveways should be submitted to the Board's Airport Building 358, Middlebelt Road, Romulus, Michigan, Phone 941-8500.

BONDS

Bonds are required on all industrial, commercial and apartment driveways to protect the Wayne County Road Commission against the cost of completing construction or repairing deficiencies. Acceptable types of bonds

are cash, certified or cashier's checks, and money orders made payable to the Wayne County Road Commission.

CERTIFICATES OF INSURANCE

Certificates of insurance are required on all industrial, commercial and apartment driveways to ensure that claims for damage or personal injury can be met. General liability insurance carried by an applicant or contractor is acceptable.

FEES

Commercial, Industrial & Apartment Driveways

A non-returnable fixed permit fee to cover the cost of processing the permit will be collected at the time the permit is issued based on the Board's current fee schedule.

A plan review fee to recover the cost of plan review will also be collected at the time the permit is issued. The plan review fee will be proportionately higher if deceleration and/or passing lanes are part of the driveway construction.

If the applicant requests driveway replacement or reconstruction utilizing an existing curb drop, he will still be required to pay the fixed permit fee for processing the permit, but will not be liable to a plan review fee.

Residential Drives

A permit is required and a non-returnable fixed permit fee for permit processing will be collected at the time the permit is issued based on the Board's current Fee Schedule. A plan review fee will not be charged.

Street Protection Permits are required when a drive approach is constructed in connection with home building operations. The permit fee will be in accordance with the Board's current Fee Schedule. A Performance Bond will also be required in connection with Street Protection Permits and Driveway Permits where a curb cut or ditch enclosure is involved.

If the applicant requests driveway replacement or reconstruction utilizing an existing curb drop, he will still be required to pay the fixed permit fee for processing the permit, but will not be liable to a plan review fee.

Miscellaneous Construction

A permit is required with fees in accordance with the Board's current Fee Schedule. A performance Bond may also be required.

A permit and fee in accordance with the Board's current Fee Schedule is required to place any type of hard surface between the edge of pavement and the right-of-way line. The actual cost of inspection will be charged against the project and a separate deposit or performance bond will be required to guarantee such costs. Where the pavement is not curbed, provisions for a curb or safety island as directed by the Board's Engineer must be provided by the owner. Approval to place hard surfacing is not to be construed as permission to park vehicles within the road right-of-way where such parking may presently or in the future be prohibited by statute or by the posting of official signs.

A permit and fee in accordance with the Board's current Fee Schedule is required to excavate in the Board's right-of-way. The actual cost of inspection will also be recovered by the Board. A separate deposit will be required to guarantee proper performance and inspection costs.

DEPOSITS

Commercial, Industrial & Apartment driveways

Should the proposed project involve road widenings and/or the construction of enclosed storm drainage in the road right-of-way, full time inspection will be required. In this case, a deposit will be taken to cover all direct inspection costs. The amount of the deposit will be determined at the time of application based on the size and scope of the project.

The Board will keep track of the actual inspection costs incurred by it in connection with each project. In the event the Board's costs are less than the deposit, the excess will be returned to the owner. In the event the Board's costs are greater than the deposit, the owner will be billed for the deficiency. The Board's objective is to recover actual costs incurrec by it.

PLANS REQUIRED

All copies of driveway permit applications must be accompanied by a plan clearly indicating the following:

1. Street name and address, highway pavement, right-of-way and property lines, lot or parcel number, highway appurtenances, medians (if existing) and dimensions of same.
2. All buildings (proposed or existing) and all appurtenances to any business conducted (gas pumps, signs, canopies, etc.) and dimensions of same.
3. Driveways to be constructed, proposed surfacing, proposed drainage scheme and dimensions including:

a. width of driveway

b. radii of driveway returns, islands and other points of curvature

c. driveway elevations

d. the approximate angle the driveway makes with the highway centerline

e. proposed culvert or sewer grades with sufficient elevations upstream and downstream to show the extent of flow across the proposed development and to the proposed outlet

4. Drainage plan and outlet for all storm drainage on the site. DRAINAGE FROM ADJACENT PARKING OR STORAGE AREAS ON PRIVATE PROPERTY MAY *NOT* BE DISCHARGED ONTO THE HIGHWAY OR ITS APPURTENANCES.

5. Location of the driveways including dimensions relating to:

   a. property lines and property lines extended to the pavement

   b. buildings and business appurtenances

   c. reference dimension to nearest cross road or street

6. North directional arrow.

The above requirements, when applicable, should be incorporated with appropriate guidelines from the Typical Drawings 1 through 10 to form a complete plan for permit application.

Proposed driveways shall be designed and constructed in accordance with the Rules and Regulations of the Wayne County Road Commission, the general guide-

lines contained herein and in accordance with the specific recommendations of the Board's Engineer. Applications and plans for platted street approaches must meet the minimum requirements shown in the published Wayne County Road Commission Subdivision Rules and Regulations.

WHERE TO APPLY

After plan approval has been obtained the permits may be secured as listed below:

Residential Drives & Miscellaneous:
Airport Building 358, Middlebelt Road, Romulus, Michigan; Phone 941-8500

Commercial, Industrial & Apartment Drives:
Engineer of Streets, 415 Clifford, Detroit, Michigan 48226; Phone 224-7600

DESIGN REQUIREMENTS

FUTURE RIGHT-OF-WAY LINE

For information regarding right-of-way requirements, the property owner is referred to the updated Master Plan for Right-of-Way adopted by the Board of Wayne County Road Commissioners on December 24, 1969. From it he shall determine the future right-of-way requirements of the road or street abutting his property before buildings, gas pumps and similar fixed objects are located on the property. In the event that future right-of-way width requirements are greater than existing right-of-way widths, all fixed objects should be located far enough from such future right-of-way that safe efficient traffic operation may be maintained on

the road or street, and functional operation of the abutting property may continue unabated when such future right-of-way is acquired for highway purposes.

BUFFER AREA

The space between the right-of-way line and the pavement edge shall be utilized to provide a physical barrier (buffer area) between highway vehicles and pedestrians or other vehicles on private property, to ensure that adequate sight distance will be available for safe traffic operation, to provide clear delineation of driveway openings, to facilitate proper drainage and to accommodate suitable slopes for maintenance operations. The buffer area may be established by curb, guardrail, guardposts, low shrubs or an equivalent method adequate to prevent encroachment. Trees, shrubs, ground cover or other landscape features within the buffer area shall be removed or suitably adjusted to provide the required sight distance.

DRIVEWAY LOCATION

Driveways shall be located so that no undue interference with the free movement of normal highway traffic will result. Driveways should be located as far from the edge of the intersecting roadway as is possible. The radius of a driveway should not encroach upon the intersection radius of the roadway pavements.

Commercial, industrial and apartment driveways, including their radii, shall be located entirely within the permit applicant's roadway frontage, which shall be determined by the extension of the property lines to the pavement edge.

NUMBER OF DRIVEWAYS

The number of driveways which will be permitted to provide access to the roadway will be the minimum number required to adequately serve the needs of the land use.

The Wayne County Road Commission encourages adjacent commercial property owners to consolidate their driveways by using either a frontage road or a joint driveway system.

The Wayne County Road Commission reserves the right to deny driveway access when such construction would result in unreasonable safety hazards.

SIGNING

The permit applicant at his expense shall provide, erect and maintain all necessary signing (Stop, Keep Right, Do Not Enter, etc.) and/or pavement markings which the Board's Engineer determines are required. The plans shall indicate the signing and pavement marking required, as specified above. All signing and/or pavement marking shall conform with the Michigan Manual of Uniform Traffic Control Devices.

PARKING AND STORAGE

It is the intent of the Board that commercial establishments of a "drive-in" nature (drive-in theaters, drive-in banks, auto washes, etc.) should provide adequate storage off highway rights-of-way for vehicles waiting to be serviced since vehicle storage on highway lanes or shoulders cannot be tolerated.

DRIVEWAY SURFACING

All driveways, except residential drives to uncurbed pavements, shall be surfaced from the edge of the traveled way to the right-of-way line with a material which is equal to or better than the surface of the traveled way which it joins. The Board's Engineer shall determine whether or not any specific material is equal to or better than the surface of the traveled way.

The minimum surface requirements for each development are as follows:

A. RESIDENTIAL DRIVEWAYS

1. The minimum surface requirement for residential driveways to gravel roads shall be 6" of compacted aggregate.
2. Residential driveways which meet a curbed pavement shall be a minimum of one of the following:
   a. 6" unreinforced concrete
   b. 6" deep strength asphalt
   c. 6" compacted aggregate with a 2" Asphaltic Concrete surface
3. Residential driveways to uncurbed hard surface roads or streets may be surfaced as described in Section A-2 but will terminate in line with the backslope of the road ditch, and balance of driveway shall be surfaced as described in Section A-1 above.

B. COMMERCIAL, INDUSTRIAL & APARTMENT DRIVEWAYS

1. The minimum surface requirement for this type driveway to a gravel road will be 10" of

compacted 3A aggregate surfaced with 2" of compacted 22A aggregate.

2. The minimum surface requirement for this type driveway to hard surface roads at developments which are considered heavy traffic generators, or which are expected to carry heavy loads, shall be either of the following:

   a. 8" unreinforced concrete pavement

   b. 9" Asphaltic Concrete base with 1½" of 31A Asphaltic Concrete Wearing Course

3. The minimum surface requirement for this type driveway to hard surface roads at developments which are considered medium or light traffic generators shall be either of the following:

   a. 7" unreinforced concrete pavement

   b. 7" Asphaltic Concrete base with 1½" of 31A Asphaltic Concrete Wearing Course

   c. 10" compacted 3A aggregate with 2" of 31A Asphaltic Concrete Wearing Course

The pavement section required for road widenings, crossovers or taper sections shall be as directed by the Board's Engineer. Shoulder areas shall conform with current Wayne County Road Commission Standards and Specifications.

The shoulder area between adjacent commercial driveways serving the same property which are less than 200' apart (centerline to centerline) must be paved as directed by the Board's Engineer.

DRAINAGE

It shall be the responsibility of the permit applicant to ensure that highway drainage is not adversely affected by proposed driveways.

Drainage from adjacent parking or storage areas on private property may *not* be discharged onto the highway or its appurtenances. All culverts, catch basins, drainage ditches and other drainage structures required within the highway right-of-way, including culverts under driveways, shall be installed in accordance with Wayne County Road Commission Standards and Specifications.

Headwalls above grade shall not be used at driveway culverts. Sod, grouted rip-rap or other suitable material shall be placed at all culvert ends to prevent erosion. Headwalls may be required where grades permit.

MAINTENANCE

The permit holder will be responsible for the maintenance of all work constructed or placed in the road or street right-of-way, except for widening lanes which are incorporated into the main traveled roadway.

INSPECTION

All driveway construction shall be performed under inspection by the Wayne County Road Commission. The executed permit will provide the Department telephone number to call for this service.

DRIVEWAY DIMENSIONS

Driveways must be designed to facilitate safe and expeditious vehicle movements to and from the high-

way. Figures 1 through 10 provide guidelines which shall be followed in the design and dimensioning of driveways in preparing plans for permit application.

The permit applicant shall indicate on the plan the driveway layout requested, including the number, type, dimensions, location and spacing of driveways. The Board's Engineer may approve the requested layout or may require changes so that the proposed layout will accommodate the vehicles normally expected without creating undue congestion or hazard on the highway.

The permit applicant shall provide a deceleration lane and/or tapers as part of a commercial, industrial, apartment driveway or other heavy traffic generators if the Board's Engineer determines that such deceleration lane and/or tapers are required to minimize congestion or hazard on the highway which may be caused by vehicles using the applicant's driveway. Typical dimensions are shown in Figures 5 and 6.

The permit applicant shall provide a passing lane on the side of the highway directly opposite a proposed commercial, industrial, apartment driveway or other heavy traffic generators when warranted in accordance with the highway vehicle volume and anticipated peak hour vehicle left turns from the highway as shown in Figure 7. When other conditions such as horizontal and vertical sight distance, traffic signal location and other physical factors directly affect public safety, a passing lane shall be required. Minimum dimensions for a passing lane are shown in Figure 8.

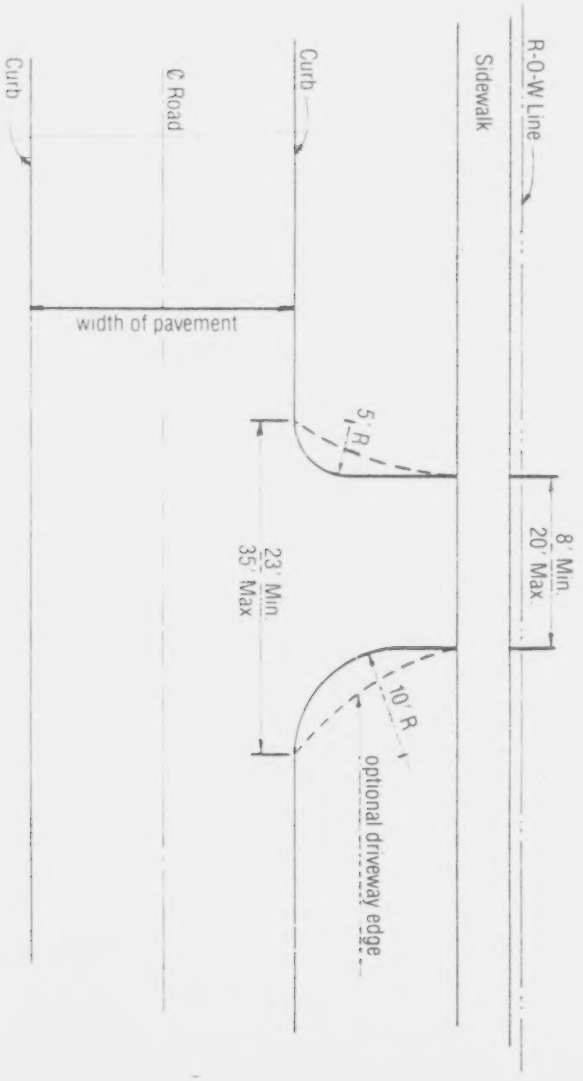
Minimum and maximum dimensions for gasoline service stations are shown in Figures 9 and 10. Angular (60 degree minimum) and perpendicular driveways may be used in pairs or combinations of each type.

Driveway openings at the curb or pavement edge shall be a minimum distance of 10 feet from the side road right-of-way line extended, and shall be a minimum distance of 5 feet from the line between abutting properties extended. These minimum dimensions are shown in Figures 9 and 10 and they apply to all commercial, industrial, apartment driveways and other heavy traffic generators.

FIGURE 1

RESIDENTIAL DRIVEWAY

CURBED HIGHWAY (Primary)

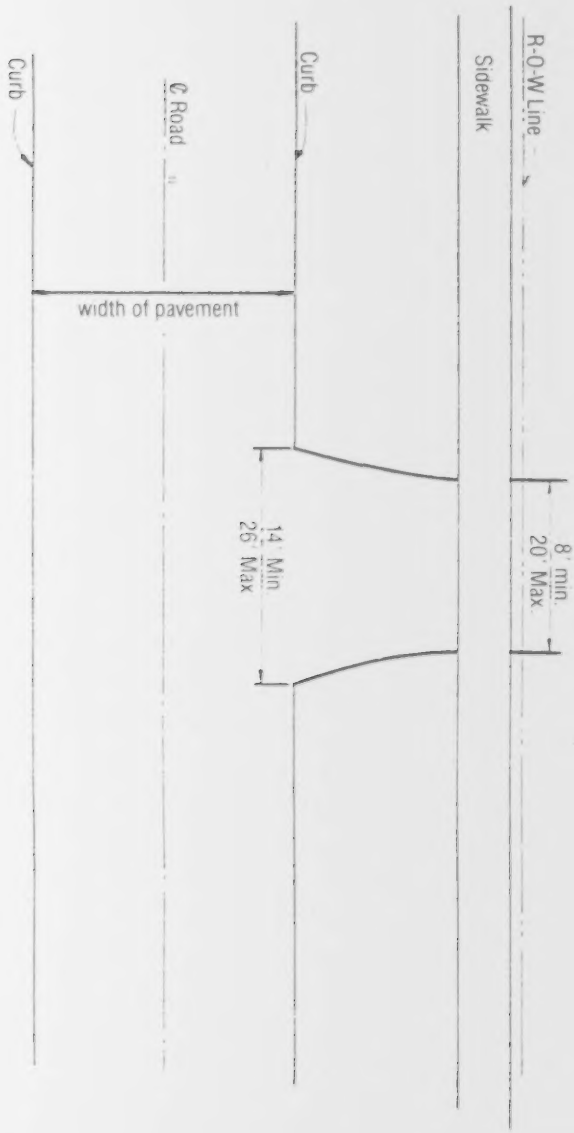


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 2

RESIDENTIAL DRIVEWAY

CURBED STREET (Local)

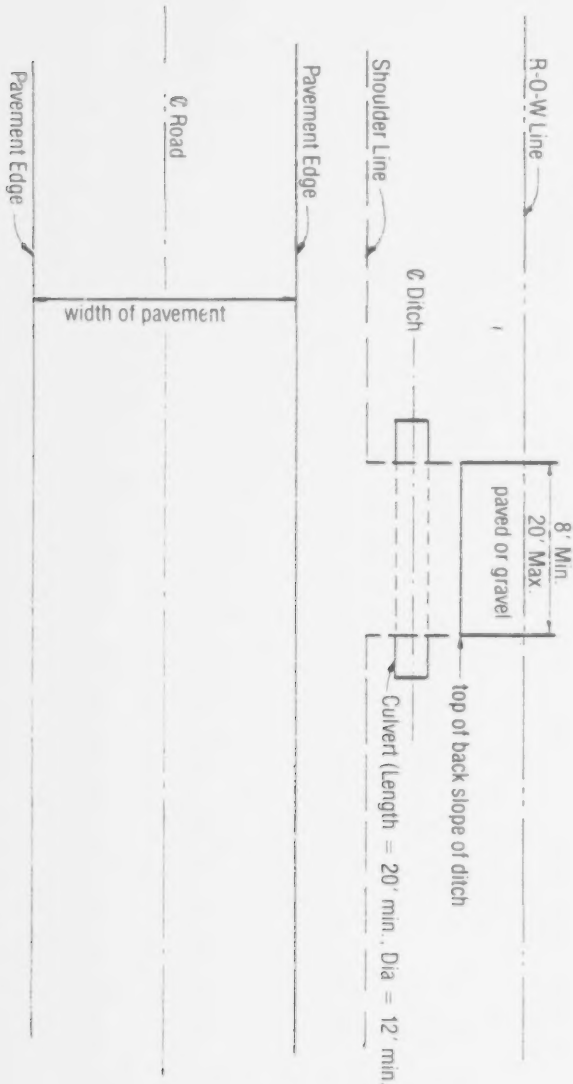


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 3

RESIDENTIAL DRIVEWAY

UNCURBED HIGHWAY OR STREET

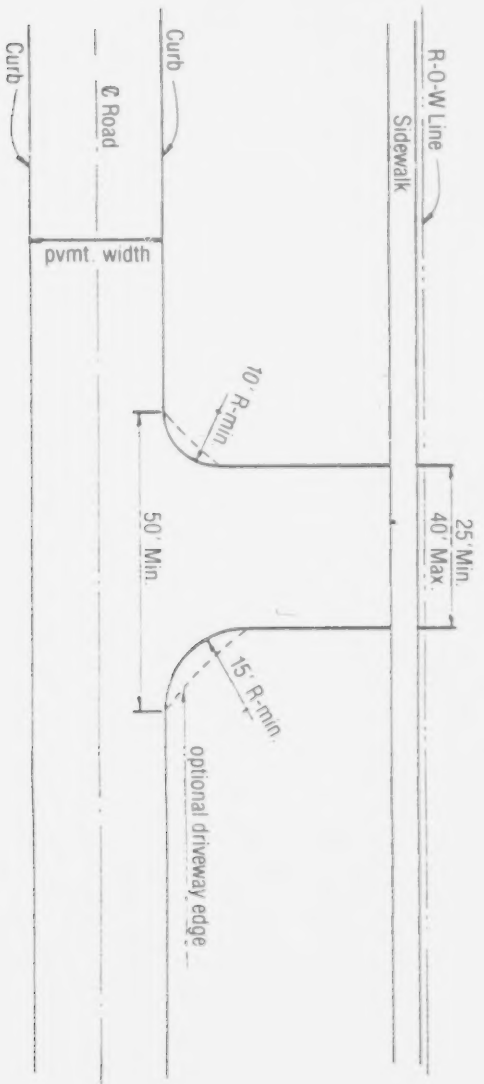


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 4

COMMERCIAL DRIVEWAY (Two-Way)

CURBED HIGHWAY

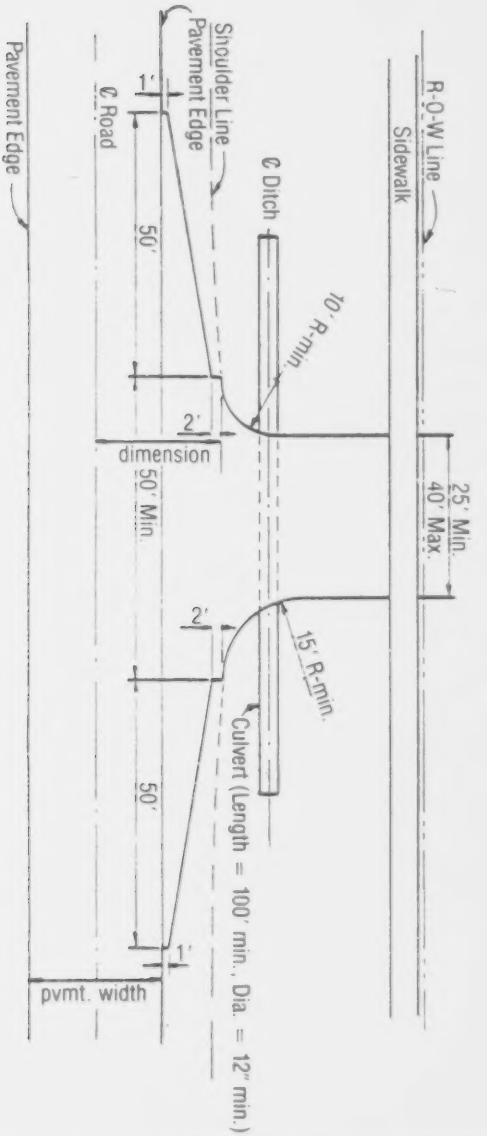


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 5

COMMERCIAL DRIVEWAY (Two-Way)

UNCURBED HIGHWAY

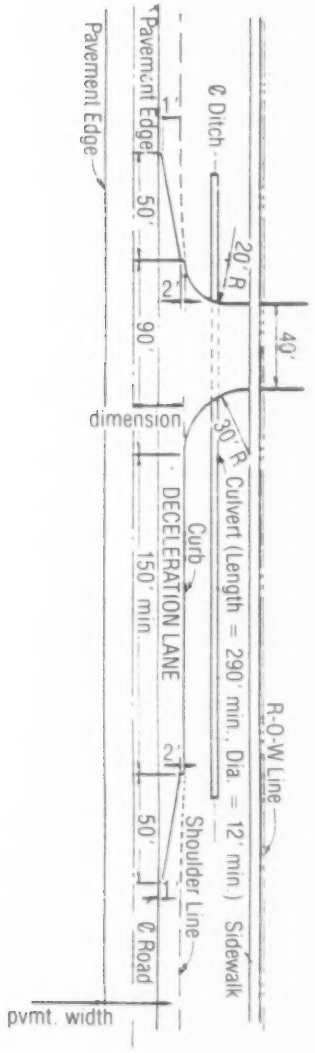


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 6

MAJOR COMMERCIAL, INDUSTRIAL & APARTMENT DRIVEWAY (Two-Way)

UNCURBED HIGHWAY



NOTE: FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."

FIGURE 7

WARRANT FOR LEFT TURN PASSING LANE

(Based on Ultimate Development)

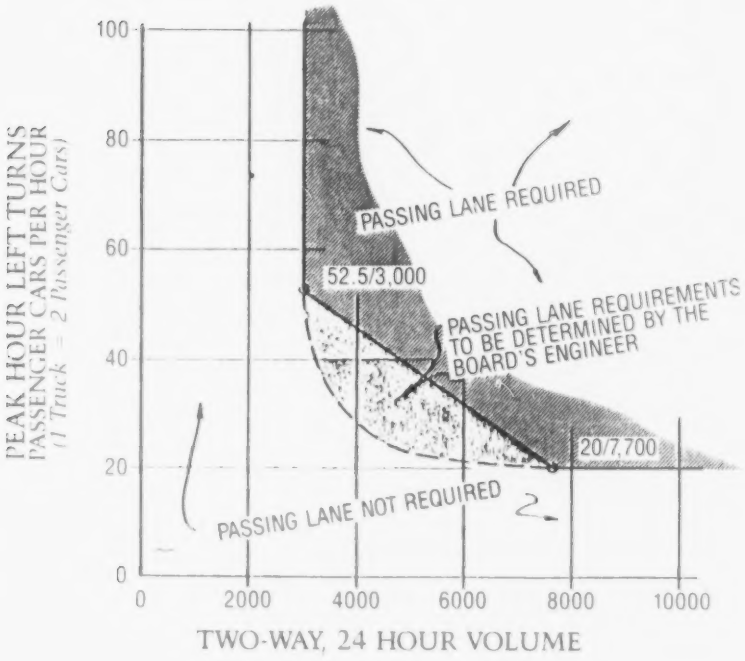
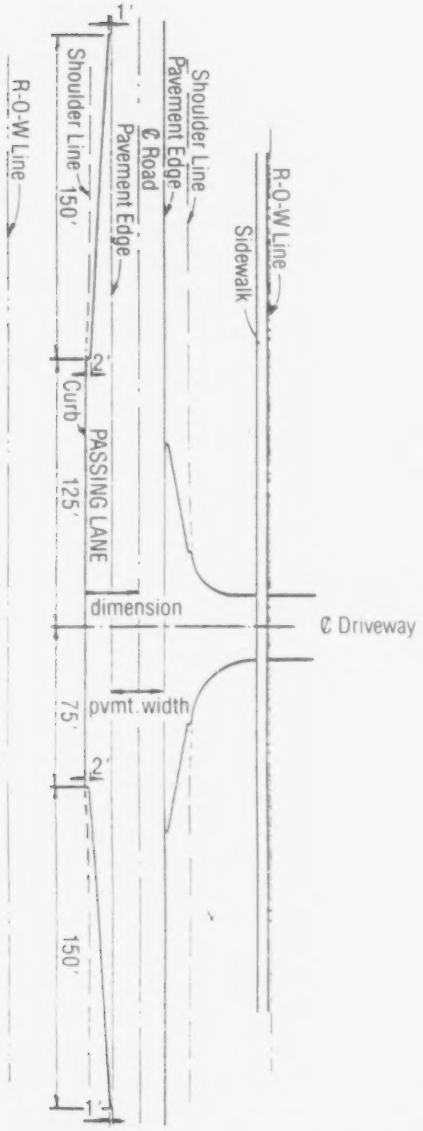


FIGURE 8

PASSING LANE

(MINIMUM)

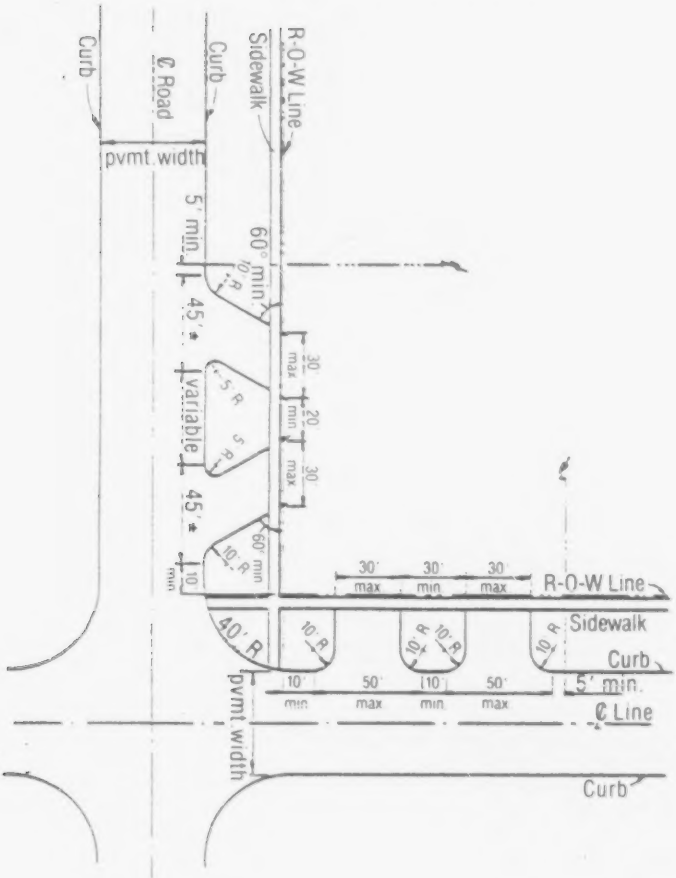


NOTE: FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."

FIGURE 9

GASOLINE SERVICE STATION DRIVEWAYS

CURBED HIGHWAY

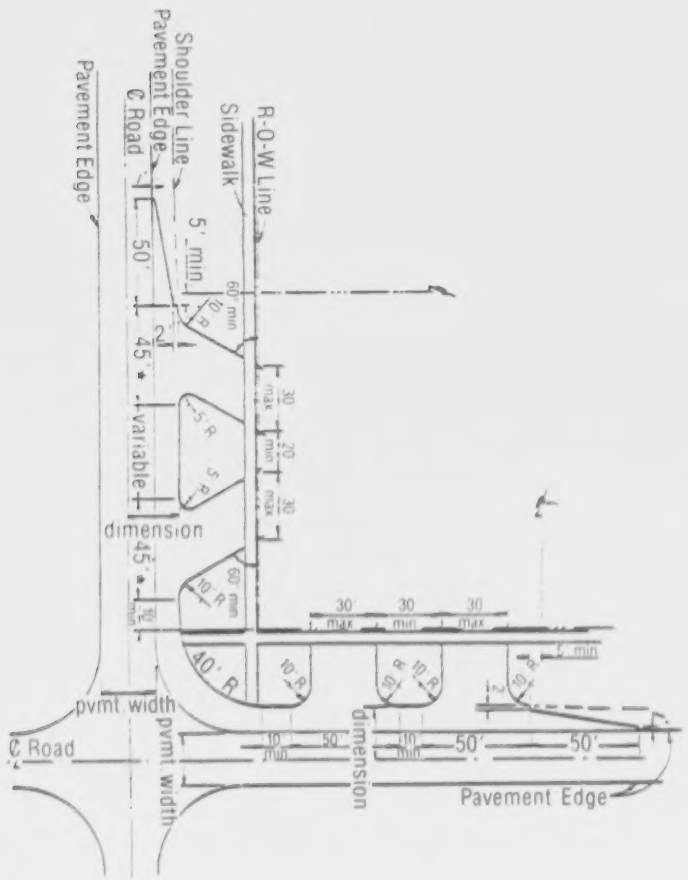


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 10

GASOLINE SERVICE STATION DRIVEWAYS

UNCURBED HIGHWAY



NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

RESPONDENTS' APPENDIX B

JUDGMENT ORDERING PLAINTIFF TO INSTALL A DRIVEWAY AND PASSING LANE

(State of Michigan — Circuit Court — County of Wayne)

(Session of February 6, 1981; Order Entered March 6, 1981)

(DANIEL BZOVI, Plaintiff, vs BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF WAYNE, MICHIGAN, a public body corporate, Defendant — Civil Action No. 80 028726 CZ)

At a session of the Court held on the 6th day of February, 1981 in the City-County Building, Detroit, Michigan.

PRESENT: Honorable Thomas J. Brennan (P 11173), Circuit Judge.

This matter having come on to be heard upon Plaintiffs Complaint and Petition for an Order to Show Cause, and argument having been made, proofs being taken in open Court, memoranda of authority being filed by the respective parties to this action, and the Court having made findings of fact and law in open Court, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED and adjudged that this Court finds, as a matter of law, that ~~the~~ Defendant BOARD acted in accordance with Act No. 200 of the Public Acts of 1969, MCLA 247.321, et. seq., MSA 9.140(21), et. seq., in requiring the Plaintiff to provide a driveway to his property and a passing lane and that the rules and regulations adopted by the Defendant BOARD pursuant to the aforesaid Statute, more particularly described as the

"Rules, Standards, and Procedures for Driveways within Wayne County Road Commission Right-of-Way", adopted in February, 1970, and revised on January 1, 1979, are legally sufficient and are reasonable and proper, and the said Plaintiff is hereby ordered to comply with the aforesaid Rules for the installation of his driveway and necessary passing lane at the West Road property as shown in these proceedings; and

IT IS FURTHER ORDERED and adjudged that the Defendant BOARD OF WAYNE COUNTY ROAD COMMISSIONERS proceeded in this action in accordance with its Statutory duty to provide for the health, safety, and welfare of the traveling public, and that the said illegal temporary driveway installed without a permit from the Plaintiff is improper in that it is unsafe and does not comply with the aforesaid "Rules"; and

IT IS FURTHER ORDERED that the Court, having made findings of the fact and rulings of law, directs the Plaintiff, DANIEL BZOVI, to proceed towards causing the construction and installatio of the driveway into his property, known as 22700 West Road, Trenton, Michigan 48183, being more particularly described as the part of the SW 1/4 of Section 16, Brownstown Township, T4S, R10E, Wayne County, Michigan, together with the necessary passing lane on the south side of West Road, in accordance with the plans and specifications filed by the Plaintiff with the Defendant BOARD and approved by said Defendant BOARD on or about February 1, 1980; and

IT IS FURTHER ORDERED and adjudged that the Plaintiff shall secure a permit from the Defendant BOARD, in accordance with regular procedure, and pay all necessary fees required by Defendant BOARD, relative to the construction of the drive approach to the above described property and the passing lane in accordance with estab-

lished practice and post a restoration bond in the sum of FIVE THOUSAND DOLLARS ($5,000.00) to assure the cleanup of the work performed under the said Permit; and

IT IS FURTHER ORDERED that the Plaintiff shall assume and pay the entire cost of the driveway approach into the aforesaid property and of the passing lane on the south side of West Road opposite the above described property, referred to hereinafter as the "PROJECT"; and [*The passing lane portion of the PROJECT shall be completed not later than June 1, 1982. The Plaintiff shall deposit with the defendant an irrevocable bank letter of credit payable to defendant in the amount of $20,000.00 to guarantee completion of the passing lane and . . .*]

IT IS FURTHER ORDERED that the Plaintiff shall retain a reputable contractor to perform the work and construction described as the PROJECT, said contractor being acceptable to the Defendant, BOARD; and enter into a contract to begin work on the PROJECT as soon as weather permits and completed within 45 days after starting work on the project.

No costs assessed, a public question being involved.

/s/ THOMAS J. BRENNAN
CIRCUIT JUDGE

(*Certification Omitted*)

RESPONDENTS' APPENDIX C

PLAINTIFF'S POST HEARING BRIEF

(State of Michigan — Circuit Court — County of Wayne)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, AND HAROLD H. BONDY, individually, jointly and severally, Defendants — C.A. No. 83 334 841 CZ; HONORABLE PAUL S. TERNAS)

STATEMENT OF THE CASE

Plaintiff is seeking relief by Writ of Mandamus or Injunctive Relief to compel the Wayne County Road Commission to issue permits to allow LOYER EDUCATIONAL TRUST to tap into certain utilities in the Sibley Road right of way and to allow plaintiff to open its strip shopping center on Sibley Road without the interference of the County in blocking or barricading the driveway, which will service its commercial development.

STATEMENT OF FACTS

Plaintiff, LOYER EDUCATIONAL TRUST, applied for permits from Brownstown Township to construct a strip shopping center on Sibley Road, between Telegraph Road and I-75. Sibley Road right of way is owned and maintained by the Wayne County Road Commission. The commercial development by the Trust was begun and construction commenced. The construction proceeded according to architect's drawings and plans which had previously been submitted to all of the Planning Com-

missions and different governmental agencies for approval and which had been approved. After applying for a permit to the Wayne County Road Commission for construction of a driveway which would access Sibley Road a two lane highway having a speed limit of 45 miles per hour, the plaintiff was denied a permit to connect to utilities under the Sibley Road Right of Way and to construct its driveway. The Wayne County Road Commission refused plaintiff's request for a permit for one major reason: Plaintiff did not agree to provide any improvements in the Sibley Road right of way and in more particular install a passing lane on the opposite side of the Sibley Road right of way from the commercial development. Plaintiff attempted on numerous occasions to meet with the Wayne County Road Commission to submit viable alternative plans to construct a safe driveway, however, the Road Commission consistently refused to allow the permit and therefore, the tapping of the utilities and opening of the Shopping Center due to the passing lane requirement. The construction of a passing lane and re-routing or enclosure of a county drain made this requirement impossible to comply with in light of the total cost of the shopping center. Plaintiff is without legal remedy in this case unless the Court takes action. Why this Court must order Injunctive Relief or Writ of Mandamus to assist the LOYER EDUCATIONAL TRUST is based on facts as presented at a hearing which included the following: That there would have to be an inordinate amount of time to rebuild the structure which was almost completed in the event it burned. There would have to be new leases drawn and the possibility of loss of these leases exists because of time passing. There is no way to measure actual money damages, even though many money damages have been sustained to this point. The future money damages will be hard to calculate. There was testimony that there is

constant vandalism and necessity for fire protection at the building. There was testimony that *competition* by way of other developments moving into the area makes time of the essence in order to allow the Loyer Educational Trust to compete fairly with the other developments in the area. There was testimony that the negative impact by way of an image of a[n] uncompleted project detracts from the appearance of the area and the general psychological impact of trying to provide an exceptionally high quality shopping center in the area. There was testimony that leases already have been broken. Testimony by L. Loyer indicated that construction on the building should be completed while the water and the soil is still frozen to mitigate a cost factor in tapping into the utilities, apparently digging deeply into the soil to tap into these utilities would be easier in the winter time when the soil was frozen and the water was not present to cause hardship. There have been many maintenance problems including the frozen roof drains and broken roof drains for the last 2 winters because of no heat in the building. The cost to the Trust is prohibitive and testimony, though not agreed upon, set the cost for the right of way improvements at $150,000.00 when the cost of the entire project is $500,000.00 to $550,000.00. The Loyer Educational Trust is, therefore, at the mercy of this Court's injunctive relief in order to get the facility opened and leased out to mitigate it's actual money damages, in view of the factors considered here as showing that the legal remedy is inadequate. Time is of the essence here and it is impossible to calculate the harm caused by delay in terms of actual money damages where a competitor opens before the Trust.

ISSUE:

DOES THE WAYNE COUNTY ROAD COMMISSION HAVE THE AUTHORITY TO COMPEL THE INSTALLATION OF ANY RIGHT OF WAY IMPROVEMENTS, AND IN PARTICULAR A PASSING LANE ON THE OPPOSITE SIDE OF THE HIGHWAY FROM THE COMMERCIAL DEVELOPMENT BY THE COMMERCIAL DEVELOPER, LOYER EDUCATIONAL TRUST?

Answer: Absolutely not.

The Michigan Supreme Court dealt with a similar issue to the instant case in *Arrowhead Development Company* v *Livingston County Road Commission*, 413 Michigan 505, 322 Northwestern Reporter 2nd series 702. In *Arrowhead*, a subdivision developer brought an action to vacate a portion of a subdivision plat and sought to prevent the County Road Commission from enforcing an agreement between the parties that would require the developer to regrade portions of road outside of the development in order to make required intersection with the County Road safer for automobile traffic. The Michigan Supreme Court held in favor of the developer in *Arrowhead Development Company*, the Court held:

> "While under § 183(1)(b) the commission could have required that Arrowhead layout Navajo Trail in a way which would locate it's intersection with Chilson Road at a safe distance from the hazardous site obstruction, it was not free, under color of § 183, to require repairs to be made on Chilson Road at the expense of the subdivider as a condition of approval of a plat in which the Navajo Trail — Chilson Intersection was laid out in the manner posing a traffic hazard. That is par-

ticularly so since the plat as submitted called for a cul-de-sac terminating Navajo Trail at Chilson Road, but the commission required Arrowhead to eleminate the cul-de-sac and open Navaho Trail, creating the concededly dangerous intersection.

"Although § 183 does not itself contain an explicit restriction on the Commission's authority to require offsite road improvements, the fact that it does not contain an explicit or fairly compiled grant of such authority suggests that none was intended by the legislature, especially since §§ 105 and 106 specifically delineate the requirements the commission may make of subdividers. We conclude that § 183 does not authorize the action of the Commission in this case.

"We are fortified in the conclusion that § 183 does not empower the commission to impose upon the appellant the duty to sustain the costs of the offsite road improvements in this case by the fact that nowhere does there exist any statutory provision to finding suitable standards governing cost allocation of offsite improvements. Apart from the constitutionality of the proposed exaction in this case, a question we neither reach nor decide, it is clear that it would be impermissable to impose the entire costs of an offsite improvement on a single subdivision developer where other persons or property would be specifically benefited. The absence of a statutory provision establishing standards and procedures for such apportionment is indicative of a legislative assumption that the responsibilities of the subdivision developer do not extend beyond the borders

> of the subdivision itself unless explicity imposed by the legislature." *Arrowhead Development Company* v *Livingston County Road Commission*, NW2d 709 (1982).

In the Arrowhead Case the position of the Livingston County Road Commission was set forth on page 708 of the opinion:

> "The Commission realized primarily upon the emphasized subsection (1)(b) of § 183 as justifying it's demand that Arrowhead sustain the costs of repairs to Chilson Road. In it's brief, the Commission declares that, '(t)he Statute (Section 183(1)(b) expressly authorizes the County Road Commission to condition approval of a plat upon certain exactions to insure the safety of those entering existing county roads from a proposed subdivision street'. Footnote *10 Appellee's Brief page 9* While we think the Appellant claims more for the language of subsection (1)(b) than is there to be found, Footnote *11 'Subsection b authorizes the County Road Commission to require adequate provision for traffic safety in laying out drives which enter County Roads'. (Emphasis added.) Arguably that is something less than 'insuring the safety of those entering the existing county roads.'* There is still other reason to conclude that in defining the powers of a Road Commission who impose requirements upon developers as conditions for approval of proposed plats, the legislature did not intend to permit the action demanded in this case."

In *Arrowhead* the State Supreme Court in reading the Act setting forth the statutory authority of the Road Commission came to the conclusion that the Road Com-

mission could not compel a subdivision developer as a condition precedent to approval of the plat to make substantial improvements in the County Road System and in Footnote 11, the opinion argues that "adequate provision for traffic safety in laying out drives which enter County Roads" is something less than insuring safety of those entering the existing county roads.

In the Loyer case, we are dealing with a driveway situation and not a subdivision development. The County has forbidden approval of a permit to open the facility and begin to conduct business based on the driveway statute. The legislature enacted Act 200, 1969 Pg 382, Driveways, Banners and Parades, an act to regulate driveways, banners and parades upon and over highways. MSA 9.140(21) Definitions sets forth the definition of a driveway. "(a) Driveway means a driveway, lane, road or other way providing vehicular access to or from the highway from or to property adjoining the highway, but does not mean a city or village street or other highway covered by the provision of Act 288 of Public Acts being Sections 560.101 to 560.293 of the Compiled Laws of 1948. (b) highway means a state trunkline highway or a county road including the entire right of way (c) highway authority means Department of State Highways in the case of state trunkline highways and the Board of County Road Commissioners in the case of county roads." The Act goes on to indicate that permits for driveways shall be granted in conformity with rules promulgated by the Highway Authority in Section 9.140(24) as follows:

> "Rules shall prescribe reasonable standards for the design and location of driveways and may require that driveways shall be hard surfaced. The provisions of this section shall not be deemed to

> deny reasonable access to a nonlimited access highway."

Additionally, § 9.140(25) indicates as follows:

> "The boards of county road commissioners may adopt by reference the rules, in whole or in part, of the Department of State Highway or may adopt its own rules after a public hearing of which Notice has been given by publication at least twice in a newspaper circulated in the county not more than thirty days nor less than seven days prior to the hearing."

The Wayne County Road Commissioners did promulgate certain rules which have been updated and which were attached to the Road Commission's Prehearing Brief called Rules Standards and Procedures for Driveways Within Wayne County Road Commission Right of Way. Within these rules includes the provision that the developer of certain parcels must include a passing lane in the right of way as part of its application for obtaining a permit to open its driveway to the public highway. It is this type of unreasonable requirement that is set forth in the Rules and Standards which the Michigan Supreme Court addressed itself to in *Arrowhead Development Company* v *Livingston County*. The Michigan Supreme Court on Page 709 said:

> "These are not costs historically imposable upon the subdivision developer. They are met by taxation and special assessments to benefit individuals and properties. Similarly, the regrading of a county road adjacent to a new subdivision development, in order to safely accomodate traffic generated by the new community, is a public obligation. A legislative intention to impose such a burden upon a nearby private developer would

> be a notable departure from the historic manner of funding alterations to public property, and we think it would have made such an intention explicit.
>
> We hold that the Commission exceeded its limited statutory powers in conditioning the plat approval upon Arrowhead's agreement to pay for the off-site county road improvement. Consequently, the judgment of the Court of Appeals is reversed."

It is clear from this holding by the Michigan Supreme Court that the statutory authority of the County Road Commission does not extend to forcing developer to pay for off-site road improvements which are clearly within the jurisdiction and duty as statutorily imposed on the County Road Commission.

Since the decision in *Arrowhead Development Company* the Michigan Court of Appeals has further defined this situation in the case of *Charter Township of Harrison* v *Calisi*, 121 Mich App 777, In Calisi, the defendants, the Calisi's, wanted to open a restaurant and nightclub facility on Jefferson Avenue in Harrison Township, Macomb County, and applied to the Township for approval of a planned expansion and improvement of their establishment. Several meetings were held by the Township Planning Commission in reviewing the site plan submitted by defendants and the Commission conditioned its approval on a requirement that the defendants construct a deceleration or a bypass lane at the entrance of their establishment so that cars waiting to turn into the restaurant parking lot would not stall through traffic. This bypass lane was not constructed. In July of 1980, the plaintiff, township, brought suit in the Macomb County Circuit Court to compel defendants to

construct the bypass lane. Plaintiff claims that the bypass lane was ordered by the Planning Commission in accordance with the Zoning Ordinance, that defendants through their attorney agreed to install the bypass in that defendants have failed to comply with the condition for issuance of the building permit and with their promise. The defendants responded to the Complaint by denying that the plaintiff had legal authority to impose a site review requirement and further denied that the Township had authority to require off site improvements as a condition for granting a building permit. The Court on Page 784 defined the issue of the case:

> "The issue that ultimately must be decided in this case is whether the condition imposed by the Township was a valid exercise of its discretion. In other words, was plaintiff permitted to require, as a condition of approving a building permit, that defendants build an off-site improvement — a bypass lane within the street right of way?"

The Court held on Page 785:

> "Analyzing both the County Road Law, MCL 224.1 et seq. MSA 9.101 et seq. and the Michigan Subdivision Control Act of 1967, MCL 560.101 et seq. MSA 26.430 (101) et seq. the Court found that neither Act authorized the Road Commission to impose the duty of payment for off-site road improvements, besides finding no explicit authority within the statutes to impose such an obligation, the Court further held that considering the Acts as a whole in the light of history and common sense no such extraordinary powers should be implied. Analysing the Township Rules Zoning Act and the Township Planning Act and their obvious relationship to the Acts considered

> in *Arrowhead Development Company* v *Livingston County Road Commission*, we find no explicit grant to the Townships nor to their Zoning or Planning commissions to condition building permits on off site improvements. Neither do we see, considering the acts as a whole in light of such history and common sense, that such authority should be implied."

The Court went on to say:

> "By finding that the plaintiff was without authority to impose the requirements that it attempted, we necessarily must find that its theories for enforcing such requirements must fail." *Calisi*, PP 787 and 788.

The Court of Appeals also set forth a quotation from the *Arrowhead Development Company* case which they relied upon:

> "The Commission relies heavily on the argument that the need to level the obstructing hill on Chilson Road is caused by the existence of the subdivision as such as a problem solely attributable to *Arrowhead*, consequently it is argued that *Arrowhead* must pay the elimination. The same argument can be made however to justify the cost of police and fire protection, traffic signals, public school facilities, public lighting, road widening and all other public services made necessary by the existence of a new residential community. These are not costs historically imposed upon the subdivision developer. They are met by taxation and special assessments to benefit individuals and properties. Similarly, the regrading of the county road adjacent to a new subdivision development, in order to safely accommodate

> traffic generated by the new community, is a public obligation. A legislative intention to impose such a burden upon a nearby private developer would be a notable departure from the historic manner of funding alterations to public property and we think it would have made such an intention explicit." *Calisi* P 786

The position of LOYER EDUCATIONAL TRUST is not dissimilar to those as set forth in *Arrowhead* and *Calisi.* Loyer is basing its case on the fact that no authority exists for the Road Commission to compel the off-site road improvements notwithstanding that the section the Road Commission is relying on is the authority to promulgate rules under the Driveway Act. The Supreme Court already addressed that Driveway Act in the *Arrowhead* case in the footnote and gave it little importance in light of the historic implications in reading the Act in its entirety. For this reason, this Court must follow the *Arrowhead* and *Calisi* cases and order the County Road Commission to issue permits to Loyer to open his driveway and tap into the utilities.

An issue was never raised suggesting that Loyer would not comply fully with all reasonable requirements as set forth by the County Engineers in tapping utilities making connections of the driveway to the right of way. Therefore, on the issue of law, the County is in violation of the law and as such this Court is empowered to compel them to stop interferring with Loyer's operation and development and to issue a building permit in the usual and proper manner.

Arrowhead sets out a clearly delineated path:

> "While there is no dispute that the Legislature has imposed this duty on counties, we are unable to find any basis to conclude that the statute

> either explicitly or implicitly authorizes the commission to discharge that duty by imposing the costs of county road improvements upon the developers of nearby subdivisions. To the contrary, the provision of the county road law which imposes this affirmative duty upon the road commission, M.C.L. § 224.1 et seq.; M.S.A. § 9.101 et seq., specifically provides that the permissible methods of financing county road improvement are borrowing and taxation. Nowhere in the statute is there to be found authorization for exacting the cost of a county road improvement from a subdivision developer, and we think none can be fairly implied." *Arrowhead* p 706

The Supreme Court's ruling could not be clearer. It follows that this court's course of action based on the facts and law should be equally clear: Order the Road Commission to stop interfering with the Trust's permit and opening of the shopping center.

Respectfully submitted,

M. Gary Holland P23197
Attorney for Plaintiff
23394 Goddard Road
Taylor, Michigan 48180

Dated: May __, 1986.

RESPONDENTS' APPENDIX D

EXCERPTED TRIAL TRANSCRIPT

(State of Michigan — Circuit Court — County of Wayne)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, -vs- WAYNE COUNTY ROAD COMMISSION, and BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES and HAROLD H. BONDY, Individually and Severally, Defendants — Case No. 83-334841-CZ)

PROCEEDINGS HAD in the above-entitled cause, before the HONORABLE RICHARD D. DUNN, Judge, Third Judicial Circuit, at Courtroom 1401 City-County Building, Detroit, Wayne County, Michigan, on Wednesday, May 13, 1986.

APPEARANCES: M. GARY HOLLAND, Esq.,
On behalf of the Plaintiff.
LAMBRO NIFOROS, Esq.,
On behalf of the Defendant.

* * *

(4) * * * THE COURT: Do you want to make an opening statement?

MS. NIFOROS: We would keep it brief, perhaps.

MR. HOLLAND: Okay.

THE COURT: All right.

MR. HOLLAND: Your Honor, Plaintiff's position in this case is that the Loyer Educational Trust is developing a shopping concern, a strip-shopping center on Sibley, between Telegraph and I-75,

THE COURT: Who is Loyer Educational Trust?

MR. HOLLAND: Your Honor, that was an educational trust that was setup by Mr. Loyer for his children. And over the course the last 20 years or so, certain amounts of money have been deposited in that trust.

His children are now grown, and they expended (5) monies on their education. And now they have completed their educations and there were certain sums left in the trust that were then invested for them in building this shopping center. And that is how the trust become the Plaintiff in this case.

THE COURT: All right.

MR. HOLLAND: The trust applied to Brownstown Township for a permit to develop the shopping concern and got certain proofs from the DNR and the township.

They began construction and they built a shell of a building. And at that time they requested a permit to open their driveway at the shopping center site, also to tap into the water line which was on the opposite side of Sibley. They were denied a permit unless they met certain requirements.

And among these requirements by the Wayne County Road Commission were that they either enclose or move the Van Cliff drain which was on the north side of Sibley. That they pave an intersection for a private road at which is called Emit, E-M-I-T. That Loyer Construction Company moved there driveway to line up with Emit. And the Loyer driveway is on the south side of Sibley Road. And additionally the fourth requirement was to put a passing lane on the north side of Sibley from the shopping center development.

The trust had expended certain amounts of money to (6) build this project. And at the time the requirements were made by the Wayne County Road Commission, they objected to them saying these were unreasonable requirements and that they weren't, the Road Commis-

sion had no authority to compel them to muck out this ditch or move it and to put this passing lane in the right-of-way.

Several different driveway designs were negotiated with the Road Commission to try to lessen any traffic hazard. None of these negotiations amounted to a settlement of the case.

Loyer Educational Trust then filed a lawsuit requesting injunctive relief, which was denied. And the case has now come to trial because the project has been setting vacant for these three or four years, because they could not open up because the road commission had threatened to barricade their driveway had they opened up without putting a passing lane on the right-of-way.

It is the Plaintiff's position that they are not required to put in right-of-way improvements such as a passing lane.

It is also the Plaintiff's position that the Road Commission was making a requirement to move the Van Cliff drain, which that is under the jurisdiction of the Drain Commission. And they made that a part of their permit.

And that was — some of this was admitted in (7) testimony that was taken prior to today before Judge Teranes in the injunctive hearing. I would like to, just briefly, my case will be the presenting of Mr. Loyer, the contractor who was the father of the children in the Loyer Educational Trust who was hired to do the work.

He was the contractor hired by the trust to put up the building and do the work. Also, I will have a real estate person here as my second witness to testify as to the amount of damages that the Loyer Trust lost as a result of this building not being opened, as a result of no permit being issued.

Your Honor, originally there was an issue in this case of Loyer not being able to tap into the water because the water was on the opposite side of Sibley.

Since the change in the administration at the Wayne County Road Commission that issue has been resolved in that even though it was part of our complaint originally, the Wayne County Road Commission under the new administration allowed Mr. Loyer to tunnel or bore underneath Sibley Road and tap into the water so he has fire protection at the building. However this did happen approximately two, two and a half years after the problems began.

THE COURT: Are there fire hydrants there?

(8) MR. HOLLAND: Yes, Your Honor.

And we are requesting that this Court make a finding that the Wayne County Road Commission had no authority to require the Loyer Educational Trust to put these improvements in the right-of-way specifically the passing lane.

Secondly, we are requesting damages in an amount to be testified to by the real estate man for the fact they have lost use of this building for the 3-4 years it has been vacant.

Thank you, your Honor.

* * *

RESPONDENTS' APPENDIX E

EXCERPT FROM PETITIONER'S BRIEF ON APPEAL TO THE MICHIGAN COURT OF APPEALS

(State of Michigan — Circuit Court — County of Wayne)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff/Appellant, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Court of Appeals No. 93959; APPEAL FROM WAYNE COUNTY CIRCUIT COURT, No. 83334841CZ)

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ISSUE II

THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION IN DENYING THE PERMIT FOR LOYER CONSTITUTED A TAKING OF PRIVATE PROPERTY FOR PUBLIC AND/OR PRIVATE PURPOSES WITHOUT ADEQUATE COMPENSATION.

The Michigan Constitution Article X, Section 2:

> "Eminent Domain; Compensation. Section 2 — Private Property shall not be taken for public use

> without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a Court of Record."

It is clear by the Michigan Constitution, Article X, Section 2, Title I, Fundamental Law, that private property can only be taken for public purpose by paying adequate compensation therefor and the clear implication in this Section of the Constitution and the holdings in cases in the State of Michigan indicate that private property may not be taken at all for private purposes. This principle was clearly stated in the case of *Soper* v *Ridgemoor Country Club*, 275 Mich 129, 266 NW 415 (1936).

The principles of constitutionality are also set forth in the Constitution of the United States. Amendment V of the Constitution of the United States which states:

> "Rights of persons charged with crimes; guarantee of life, liberty and property. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces or in the malitia, when in actual service in time of a war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution Amendment V.

The testimony at the trial in this matter was clear. The taking of LOYER's property was the act of denying him a permit unless he complied with the demand by the Wayne County Road Commission to put in improvements that they were not authorized to request of him. Since the Wayne County Road Commission had authority to grant or deny permits, they used their color of authority to deny the opportunity for LOYER to open the Sibley Plaza. This constituted the taking of the LOYER property. Additionally, the testimony is replete with references that allowed a competitor located just down the street from LOYER to open his business while not imposing the same requirements on that competitor. (See portion of Transcript Attachment B)

The damages requested by Loyer Educational Trust at the Trial were uncontested. LOYER suffered loss of rents which were established by expert testimony and not rebutted. Additionally, Loyer presented uncontroverted testimony of the discriminatory practices of the Wayne County Road Commission in granting a driveway permit and sharing the cost of improvements with a competitor of LOYER in the same vicinity as the Sibley Shopping Plaza. LOYER asks that this Court summarily dispose of the issue of damages by awarding its request of damages in the amount of $872,000.00 plus costs, interest and attorney fees so wrongfully sustained.

ISSUE III

THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION CONSTITUTED DISCRIMINATION AND A DENIAL OF EQUAL PROTECTION TO LOYER EDUCATIONAL TRUST.

It is clear that the Wayne County Road Commission can require a developer to do certain things to put in his

driveway. *The Driveway Act* would lead a reasonable person to believe that a driveway is a driveway and not a major highway improvement project. The Act sets forth those things necessary to make a driveway meet the road surface, i.e. paving of aprons on the shoulder, design and location, requirements for hard surface and any necessary culverts under the driveway to connect into the drainage system are the items to be considered.

The expansive interpretation that the County seeks to place on *The Driveway Act* is illegal, illogical and impermissible. The delegation of authority to which the Wayne County Road Commission aspires by the many requirements that they have promulgated under *The Driveway Act* are impermissible in view of the fact that they have no clearly defined standard or plan for financing road improvements and none was set forth by the legislature.

The discriminatory practice gives rise to the question of damages. In this case, the Engineer for the Wayne County Road Commission was asked to define how the treatment of LOYER differed from the treatment of the competitor down the street. This questioning is set forth in Attachment B hereto. Additionally, LOYER's counsel asked the question of Mr. Richardson, the County Engineer, at Page 291, Line 24 of the Transcript:

> "Q. *Do you have some kind of policy or standard drawn up at the old Wayne County Road Commission that would decide who has to pay what and when?*
>
> "A. *No.*
>
> "Q. And pretty much it is left to the staff members as they see a situation; is that not correct?

"A. In this situation it was a staff determination.

"Q. Okay. But there are not standards?

"A. No what?

"Q. For payment for allocation of payment are there?

"A. There is a history of how we do business.

"Q. Okay. Now, do you — where did the money come to do the portion of the paving that Mr. Koza did not pay for?

"A. At the Racco (*sic* Racho) Road intersection?

"Q. Yes.

"A We widened the Racco (*sic* Racho) Road intersection with the use of Act 51 funds.

It is clear from this answer that the Wayne County Road Commission chose to charge the individual developers an arbitrary and capricious amount. For instance, LOYER estimated his costs of improvements unlawfully required by the Wayne County Road Commission at over ONE HUNDRED THOUSAND ($100,000.00) DOLLARS. The Road Commission estimated LOYER's cost at FORTY THOUSAND ($40,000.00) DOLLARS to FORTY-FIVE THOUSAND ($45,000.00) DOLLARS. The estimate of the improvement to the competitor for a passing lane was SIXTEEN THOUSAND ($16,000.00) DOLLARS with an actual payment of SIX THOUSAND ($6,000.00) DOLLARS. Wayne County Road Commission has no definable standards for applying the proration of costs for any type of improvement. Therefore, in the application of any Act they may be endeavoring to come within, the County Road Commission shows a clear discrimination

toward LOYER. This type of application of a non-standard is violative both of the *County Road Law* and the *Michigan Constitution* and the *United States Constitution,* Amendent V and XIV, in violation of the "due process clause" and "equal protection clause".

* * *

RESPONDENTS' APPENDIX F

EXCERPT FROM PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

(State of Michigan — Supreme Court)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff/Appellant, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Supreme Court No. ____; Court of Appeals No. 93959; Wayne County Circuit Court No. 83334841CZ)

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Recently the United States Supreme Court handed down its decision in a series of cases wherein regulation by a governmental agency constituted a taking for which compensation is required.

These cases are: *First English Evangelical Lutheran Church of Glendale* v *County of Los Angeles, California*, 96 LE2d 250, 107 S. Ct. 2378 (1987) and *Nollan*, v *California Coastal Commission*, 107 S. Ct. 3141 (1987), and they bolster the argument already set forth in Plaintiff/Appellant's Brief regarding the taking of Plaintiff/Appellant's property and the necessity of compensating Plaintiff/Appellant for that taking even though it may only be a temporary taking.

The Michigan Court of Appeals applied the law in the case of *Poirer* v *Grand Blanc Township, et al*, Lawyers Weekly No. MA-5779 and determined there was a temporary taking requiring compensation.

It must be pointed out that these cases dealt primarily with zoning issues, however the Constitutions of Michigan and The United States apply to all laws, not just zoning issues where there has been a taking without adequate compensation.

Once the Trial Court and Court of Appeals found that the action by Wayne County Road Commission was proper, they summarily dismissed *Loyer's* argument that

the action constituted a taking without adequate compensation.

The Court of Appeals also summarily dismissed the "Due Process" argument and "Equal Protection" argument "finding no disparite treatment."

The fact of the matter remains that *Loyer* has been unable to open its Shopping Center and damages continue.

ISSUE III

THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION CONSTITUTED DISCRIMINATION AND A DENIAL OF EQUAL PROTECTION TO LOYER EDUCATIONAL TRUST.

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* * *

SEP 20 1989

No. 88-2125

In The

Supreme Court of the United States

October Term, 1989

LOYER EDUCATIONAL TRUST,
LARRY McDONALD, TRUSTEE,

Petitioner,

v.

WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY, Individually, Jointly and Severally, now County of Wayne, its Successor in Interest,

Respondents.

PETITIONER'S REPLY BRIEF

IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

– AND APPENDICES –

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No. 88-2125

In The

Supreme Court of the United States

October Term, 1989

LOYER EDUCATIONAL TRUST,
LARRY MCDONALD, TRUSTEE,

Petitioner,

v.

WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY, Individually, Jointly and Severally, now County of Wayne, its Successor in Interest,

Respondents.

PETITIONER'S REPLY BRIEF
IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY TO RESPONDENTS' RESTATEMENT OF FACTS

LET THERE BE NO MISUNDERSTANDING THAT REQUIRING IMPROVEMENTS TO THE OPPOSITE SIDE OF THE STREET TO BE PAID FOR SOLELY AT LOYER'S EXPENSE AS A CONDITION OF OBTAINING A DRIVEWAY PERMIT WAS ALWAYS THE ISSUE IN THIS CASE AND WAS SO STIPULATED BY THE PARTIES AT THE OUTSET OF THE PROCEEDINGS.

(See Appendix O, Excerpt of Transcript of Proceedings, p. O-1, *infra.*)

The Brief of Respondents (hereinafter ROAD COMMISSION) improperly uses the statement of facts for argument. The ROAD COMMISSION hedges on the question of whether the improvements to the opposite side of the street in this case were required by it. The ROAD COMMISSION wants this Honorable Court to believe the improvements were caused by PETITIONER (hereinafter LOYER) in moving its driveway. LOYER moved the driveway in an attempt to resolve the case before trial to alleviate the condition of the permit requiring installation of the costly road improvements on the opposite side of the road.

The ROAD COMMISSION has commented on or inserted items not a part of the record in its statement of facts, including but not limited to an allegation of storage of construction equipment in the vacant building. This did not happen.

The ROAD COMMISSION also misstated the position on the bond which was offered to LOYER to be posted to open the project. This bond was for a low amount and was without a ceiling or fixed penal sum; the testimony at trial disclosed that if LOYER had posted the bond and additional money was required to install the improvements, the ROAD COMMISSION would have sought the additional amounts from LOYER. This was no offer to allow LOYER to mitigate damages. (See Appendix Q, Excerpt of Transcript of Proceedings, p. Q-1, *infra.*)

Additional facts were either misrepresented or misstated, but they do not affect the legal issues presented.

ARGUMENT

I.

THE FEDERAL QUESTION

LOYER properly preserved and raised the federal questions throughout trial and appeal. The *Federal Civil Rights Act* and *discrimination* against LOYER was plead in the original complaint in state court. (See Appendix L, p. L-6 of Petition for Certiorari.) Michigan merely requires a pleading which informs the other party of the facts upon which the case is based.

Michigan General Court Rules of 1983, GCR 111 GENERAL RULES OF PLEADING:

> .1 Statement of Claim. A pleading which sets forth a claim for relief, whether a complaint, counterclaim, crossclaim or third party claim, shall contain
>
> (1) a statement of the facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend; . . .

(Appendix P, p. P-1, *infra.*)

The Road Commission raised no objections in the lower courts as to the form in which the issues were raised.

LOYER raised the "DUE PROCESS" and "EQUAL PROTECTION" arguments on Appeal to the Michigan Court of Appeals. The Michigan Court of Appeals decided

these issues without analysis or discussion. (See Appendix F, pp. F-7, F-8 of Petition for Certiorari.)

LOYER raised the "TAKING WITHOUT JUST COMPENSATION" issue in the trial court, which was also decided by the Michigan Court of Appeals without any analysis. (See Appendix F, pp. F-7, F-8 of Petition for Certiorari.)

LOYER was never given the opportunity to argue or brief these issues before the Michigan Supreme Court because they denied the Application For Leave To Appeal and Motion For Reconsideration.

II

RESPONSE TO RESPONDENTS' QUESTION

The ROAD COMMISSION raised the following question:

> IF A STATE COURT'S JUDGMENT RESTS ON A STATE GROUND, THE UNITED STATES SUPREME COURT HAS NO JURISDICTION TO REVIEW THE CASE, AND CERTIORARI CANNOT BE GRANTED.

This issue is clearly erroneous as applied in this case, in view of the fact that LOYER raised the federal questions in the state court. An adherent component of the federal questions presented was that "state action" conflicted with federal constitutional mandates.

Under the ROAD COMMISSION'S position on this matter, the United States Supreme Court would never be able to review a state action as violative of the United States Constitution because it was a "state matter". The cases cited by the ROAD COMMISSION do not apply here because the "DUE PROCESS," "EQUAL PROTECTION," and "TAKING WITHOUT JUST COMPENSATION" issues

were all raised on appeal to the Michigan Court of Appeals. A reading of the case cited in support of the ROAD COMMISSION'S position, *Williams* v. *Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945), held that the state action was reviewable based on "Due Process" grounds and that the state action was repugnant to the United States Constitution.

The real issue in this case is:

> **Whether the ROAD COMMISSION can compel a private individual to install offsite improvements which specially benefit surrounding landowners and the public at the private individual's expense without apportioning the cost of the improvements among those specially benefited thereby.**

The theory of authority to regulate presupposes that the person being regulated has dominion and control over the person or property which is the subject of the regulation.

In the *LOYER* case, LOYER had no dominion and control over the roads or drains on the other side of the street, nor did LOYER have dominion and control over the private gravel road — EMIT — leading to the subdivision on the opposite side of the street. The Subdivision could have denied permission for LOYER to do any work on their private road since it had never been dedicated to the County. While it would have been highly unlikely that the Subdivision would have turned down the opportunity to have an improvement paid for at LOYER'S expense, it nevertheless illustrates the lack of dominion and control LOYER exercised over property on the other side of the street.

It is LOYER'S position that its driveway could be reasonably regulated, however, that regulation does not

extend to property over which it had no dominion and control. Furthermore, LOYER was asked to improve the road from a two lane street to a four lane street in addition to improving the drainage system. This was not a case where the alterations to the road were solely attributable to LOYER. This was a case where LOYER could have attached its driveway to the existing road surface and drain system without any of the improvements required by the ROAD COMMISSION except for the fact that the ROAD COMMISSION wanted to make a capital improvement project out of a driveway permit application. In so doing, the ROAD COMMISSION crossed the line between regulation and confiscation.

The ROAD COMMISSION could not force the subdivision across the street from LOYER to put in the same improvements requested of LOYER because, according to *Arrowhead Development Co.* v *Livingston County Road Commission*, 413 Mich. 505, 322 N.W.2d 702 (1982), the Subdivision Control Act did not contain a provision for apportioning the cost of those improvements among properties specially benefited thereby. The ROAD COMMISSION would be left to one of two methods to finance the improvements had they chosen to do the improvements. These two methods are:

1. The general taxing power of the county; or
2. Declaring a Special Assessment District and assessing properties specially benefited on square foot or front foot basis.

The action by the ROAD COMMISSION was violative of "DUE PROCESS" and "EQUAL PROTECTION" because, neither the "DRIVEWAY ACT" (Appendix N of Petition for Certiorari) nor the "Rules" (Respondents' Appendix A of Brief in Opposition) promulgated by the ROAD COMMISSION apportioned the cost of offsite improve-

ments, which specially benefited the surrounding landowners and the public. The ROAD COMMISSION admittedly had "no standard to determine who had to pay what and when." (Petition for Certiorari, p. 7.)

The Michigan Courts should be reversed on this point. The *Arrowhead* case, *supra*, incorporates the reasoning of the "DUE PROCESS" and "EQUAL PROTECTION" clauses into its analysis. LOYER has merely requested the same treatment be applied to it as to others similarly situated.

Without direction from this Court, the ROAD COMMISSION'S authority will go unchecked:

> What would limit the ROAD COMMISSION from requiring LOYER to put in lanes for two miles in either direction from the shopping center as part of a condition for obtaining a driveway permit if they elect to make that part of the driveway rules?
>
> ANSWER: Nothing except the limitation required by the "DUE PROCESS CLAUSE" and "EQUAL PROTECTION CLAUSE" requiring the costs to be apportioned among those specially benefited.

III

POLICY CONSIDERATIONS

This case is important not only to LOYER, but to all of the people of the State of Michigan and the people of the United States. As this country becomes more highly developed every local government and developer will have to confront this issue.

When a developer develops property and is required to put in offsite improvements, what are the limitations on

the power of the State governments to require such improvements? One limitation should derive directly from this case — The "Due Process" and "Equal Protection" clauses of the United States Constitution require that any offsite improvements which specially benefit surrounding landowners and the public be apportioned among those specially benefited.

This case is also important to make local governments accountable for their actions in taking the use of private property. LOYER requires compensation for the taking of the use of the property by the denial of the driveway permit.

LOYER exhausted all of its state remedies in this action consistent with the holding in the case of *Williamson Planning Comm'n* v *Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) which was cited by Respondents in their brief.

The position of the ROAD COMMISSION and the State of Michigan Courts has been one of avoiding the issues throughout the proceedings. No real analysis of the fundamental issues raised by this case was attempted by the state courts.

LOYER has not requested that any greater burden be placed upon the government in this case than private individuals would place upon themselves. If two individuals were to build a road which serviced both of their properties equally, would they not agree to divide the costs of that road between themselves? LOYER has not asked to be treated any differently.

CONCLUSION

PETITIONER, LOYER, requests that this Honorable Court reverse the Michigan Court's holding in *Loyer* v *Wayne County Road Commission, et. al.*;

PETITIONER further requests that money damages be granted for the taking of the use of the property by the wrongful denial of the Driveway permit;

PETITIONER further requests that this Honorable Court enter its ruling that the "Due Process Clause" and "Equal Protection Clause" require apportionment of the cost of offsite improvements which specially benefit surrounding landowners and the public.

Respectfully submitted,

By: /s/ M. GARY HOLLAND
Counsel of Record

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Attorney for Petitioner,
LOYER EDUCATIONAL TRUST,
LARRY McDONALD, TRUSTEE

DATED: September 19, 1989

APPENDICES TO PETITIONER'S REPLY BRIEF

(Reprising the pagination from Petitioner's Writ of Certiorari)

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APPENDIX O

EXCERPT OF TRANSCRIPT OF PROCEEDINGS

* * *

[3] Detroit, Michigan
Friday, January 6, 1984 — at about 2:25 P.M.

THE CLERK: Loyer Educational Trust versus Wayne County Road Commission.

MR. HOLLAND: I am Gary Holland, appearing on behalf of the Loyer Educational Trust, Plaintiff in this matter.

MR. KRALL: Marty Krall, your Honor, appearing on behalf of the Wayne County Road Commission.

MR. GEORGE: John George, your Honor, appearing on behalf of the Charter, Township of Brownstown.

MR. HOLLAND: Your Honor, this matter was brought on today for a hearing for purposes of determining whether or not the preliminary injunction should issue or a writ of mandamus should issue in this case and basically I am asking for a bifurcated hearing and we've included elements of monitary damage in our complaint.

However, our primary interest is being able to open a shopping center that Plaintiff has constructed on Sibley Road in Brownstown Township.

The basis for our dispute is that we applied for a permit from the Board of County Road Commissioners in Wayne County to tap into certain utilities on Sibley Road being a sewer and water and whatever other utilities were necessary.

(4) The County Road Commissioners granted a permit subject to certain conditions, those conditions being that we would have to put a driveway into the shopping center in accordance with certain regulations that they had adopted and according to these driveway laws as set forth in the Michigan Statutes.

Part of the problem with that, the standards set up by the Road Commissioners included putting a passing lane on the opposite side of the street from my client's development and also doing other work including moving a county ditch in order to secure a passing lane on that side of the highway. My clients have basically no dispute in complying with any regulations that are reasonable for making their own driveway. The bone of contention here is that my client feels that there is no legal authority or any other authority to compel him to make road improvements to Sibley Road either under the driveway law or any other regulations that the Board of Road Commissioners might have.

We primarily are relying upon the case of *Arrowhead Development Company* v *Livingston County Road Commission*, 413 Mich 505.

Your Honor, we have brought Mr. Loyer here to testify today. However, I think the factual issues are relatively agreed upon.

MR. KRALL: The facts have been agreed upon to a (5) certain extent, your Honor.

THE COURT: I read the briefs that were submitted and it would seem that there isn't really a factual dispute as to what the Road Commission is asking the Plaintiff to do. It would appear to me that the facts are pretty much agreed upon.

MR. HOLLAND: Your Honor, what I would request is that if the facts as I have stated them are satisfactory to the Court and obviously my client cannot afford to put these improvements in, and that's his basic disagreement

with the Road Commission and he feels that he shouldn't have to put these improvements in, what I would suggest is that I be allowed to have one week to submit a brief and brief this Arrowhead case in relationship to this issue and allow the Road Commission to respond to that brief and have the Court decide it as a legal issue in view of the fact that these facts are not in dispute.

THE COURT: Let me ask the Road Commission, is it true that the facts are not really in dispute?

MR. KRALL: That is correct, your Honor. Counsel for the Plaintiff and myself have earlier, before the hearing, agreed to adopt the statement of facts contained in the Road Commission's pre-hearing brief, plus two additional facts, your Honor: One, that the Plaintiff does not contest that the passing lane is in fact required by the Road (6) Commission rules and further that Plaintiff does not contest that the passing lane is a safety feature but simply that the Road Commission is not authorized by statute to adopt the rule relative to requiring Plaintiff to install the passing lane.

THE COURT: So what it really boils down to is the legal issue as to whether or not the Road Commission could require that the Plaintiff put in the passing lane in order to get its permit to connect up with sewers and other utilities, is that right?

MR. HOLLAND: And to open their driveway for traffic into the shopping center, that's correct, your Honor.

THE COURT: What is the status right now with the shopping center? Is it completed?

MR. HOLLAND: Your Honor, it is almost completed. There are certainly some interior things to be done. However in a relatively short period of time the interior of the shopping center could be completed and people could be in there leasing the premises.

We have been held up for a couple of years by the Road Commission in opening up and obviously my client is losing money each day he cannot open and the dispute with the Road Commission is the impediment to allowing my client to open.

THE COURT: All right. As far as your suggestion (7) is concerned, what is the Road Commission and the Township's position on submitting this dispute on briefs?

MR. KRALL: Well, inasmuch as we did stipulate to the facts, your Honor, relative to the safety feature of the passing lane, we have no further evidence that would be necessary to put in. So we could submit the issue as a matter of law.

THE COURT: All right. Would you want an opportunity to argue after the submission of further briefs?

MR. KRALL: I believe that is necessary, your Honor.

THE COURT: Why don't we set up a time table then for submission of briefs. You indicated for the Plaintiff a week?

MR. HOLLAND: I would like a week from Monday. I would like to have the extra weekend if I could, your Honor.

THE COURT: I have no problem there. How about the Road Commission and the Township, the time for a response?

MR. KRALL: Ten days after the submission of Plaintiff's brief?

THE COURT: Ten days was going through my mind too. So why don't we go with — let's see, a week from Monday is the 16th. The Court will be closed. Why don't we make it the 17th.

MR. HOLLAND: Okay.

(8) THE COURT: And then 10 days from then would be the 27th — what day of the week is that, Jack?

THE CLERK: Friday.

THE COURT: Friday. How is that?

MR. KRALL: That's fine, your Honor.

MR. GEORGE: That's fine, your Honor.

THE COURT: All right. After that why don't we set up oral argument on the first Friday after the 27th.

THE CLERK: February 3rd.

THE COURT: How is that at 2:00 o'clock in the afternoon?

MR. HOLLAND: That's fine, your Honor.

MR. KRALL: Yes, I will agree to that, your Honor.

THE COURT: All right. Now, as far as — was it Brownstown Township?

MR. GEORGE: Yes, your Honor.

THE COURT: Do you wish to submit a brief? I wasn't sure if the Township was actually a party joined by the Plaintiff or not.

MR. HOLLAND: Your Honor, I included the township for the reason that I didn't want this to go through the Court and then suddenly come back and find that we couldn't get a certificate of occupancy for some minor reason. I wanted to include this because we have been a long time without opening this facility and I wanted to make sure that (9) if there were any objections by the Township, that they raise them at this point.

THE COURT: Does the Township wish to submit any briefs on this particular issue before the Court?

MR. GEORGE: Your Honor, at this point we would say, no. I have discussed this matter with the Township officials. We have really no objection to Plaintiff's actions and we are ready, willing and able to issue a certificate of occupancy once the Plaintiff ties into the sewer and water system. Basically no allegations have been raised at this point that we have in any way interferred with the Plaintiff's ability to open for operation. At this point I don't see any reason why that would be the case in the future.

THE COURT: Okay, fine. So we will set it up then for a brief from the Plaintiff on the 17th of January, the Road Commission on the 27th and have a hearing on February 3rd at 2:00 P.M.

MR. KRALL: Your Honor, just for clarification, the nature of these briefs and arguments, now that again would be for summary judgment under the court rules as opposed to any order to show cause for preliminary injunction.

THE COURT: Well, the action is still injunctive relief. You are still asking for injunctive relief, is that correct?

* * *

APPENDIX P

MICHIGAN GENERAL COURT RULES OF 1963, GENERAL RULES OF PLEADING

Rule 111 General Rules of Pleading.

.1 Statement of Claim. A pleading which sets forth a claim for relief, whether a complaint, counterclaim, cross-claim or third-party claim, shall contain

(1) a statement of the facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend;

(2) where the pleader seeks money, a statement that the amount in controversy exceeds $10,000 or is otherwise within the jurisdiction of the court; and

(3) a demand for judgment for the relief that the pleader seeks. If he seeks money, he shall demand judgment for "whatever amount [the pleader] is found to be entitled." However, the adverse party may under Rule 309 obtain a demand for a specific amount of money; if he does, the demand shall be treated as if it had originally been furnished under this subrule.

Declaratory relief, in cases of actual controversy, may be claimed. Relief in the alternative or of several different types may be demanded.

* * *

APPENDIX Q

EXCERPT OF TRANSCRIPT OF PROCEEDINGS

* * *

(294) * * * Q. Okay.

Now, in Mr. Loyer's situation, we had an estimate of $40,000, which has been revised a little maybe upwards a little maybe $40,000 now for him to do his project. Was there the same termination of (295) responsibility in Mr. Loyer's situation upon payment of a fixed amount of money?

A. No.

Q. Mr. Loyer's situation was open ended what [*sic*] is it not?

A. (No response.)

Q. I believe your testimony earlier was that if $40,000 wouldn't have covered the improvement that it was a possibility you would have go [*sic*] after Mr. Loyer for additional amounts; is that correct?

A. What we presented to Mr. Loyer was that he was required to place a passing lane.

Q. Well — Answer my question, please.

A. Which question?

Q. The one I just asked you?

A. Would you repeat it please.

Q. Sure.

In Mr. Loyer's situation, you testified earlier that if Mr. Loyer put up a letter of credit or anything else regarding this $40,000, if that amount was not enough to cover the improvement in the passing lane, that it was a possibility that the Wayne County Road Commission or its successor would go after Mr. Loyer for amounts over and above that $40,000?

A. That situation would come into play if Mr. Loyer, through the permit arrangement that was previously (296) agreed to, subsequently failed to place the passing lane, and then we made a decision based on safety considerations that it would have to be placed through our means at whatever cost.

* * *